No. 91-908

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In The

Supreme Court of the United States

October Term, 1991

GLADYS MURRAY, On Behalf of Herself
And All Others Similarly Situated
(and 27 Other Individuals),

Petitioners,

v.

STUCKEY'S INC. and
PET INCORPORATED,

Respondents.

Petition For A Writ Of Certioari To The United States Court Of Appeals For The Eighth Circuit On Behalf Of Gladys Murray, And 27 Other Individuals Similarly Situated

PETITION FOR WRIT OF CERTIORARI

P. L. NYMANN
Counsel of Record for Petitioner
383-390 Orpheum Electric Bldg.
P.O. Box 1825
Sioux City, Iowa 51102
Phone: (712) 258-0101

STEVEN C. KOHL
Co-Counsel for Petitioner
383-390 Orpheum Electric Bldg.
P.O. Box 1825
Sioux City, Iowa 51102
Phone: (712) 258-0101

P. L. NYMANN
and
STEVEN C. KOHL
On the Petition

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred when it engaged in factfinding contrary to the teaching of *Icicle Seafoods Inc. v. Worthington*, 475 U.S. 709 (1986), and prior U.S. Supreme Court cases?

2. May the Court of Appeals substitute its judgment of the facts in an FLSA case for that of the trial court?

3. Has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

LIST OF PARTIES TO THE PROCEEDING

1. Gladys Murray
2. Floyd Caskey
3. Allan Christiansen
4. Donald Scott
5. Deborah L. Hoyt
6. Russell C. Renecker
7. Eugene A. Rutledge
8. Lawrence B. Taylor
9. Warren Kajander
10. Jeannette Petrimoulx
11. Kinney Bryant
12. Carol S. Lewis
13. Harley Blair
14. Thomas Miller
15. Sandra Crist
16. Larry Brown
17. Randy Bushnell
18. Bobbie Cockrell
19. Mary T. Cope
20. Stanley Dixon
21. Thomas Foster
22. Edward Geisenheimer
23. Rae Jean Hamilton
24. Loren Jacoby
25. Donald Phillips
26. Joy M. Powers
27. Arthur Stotts
28. David Tompkins
29. Stuckey's Inc.
30. Pet Incorporated

TABLE OF CONTENTS

Page

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW 2

JURISDICTION 3

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

A. The holding of the Eighth Circuit is in Conflict with the Decisions of this Court 7

B. The holding of the Eighth Circuit is also in Conflict with recent Decisions in the Fifth Circuit, the Third Circuit, and the Eleventh Circuit 11

C. The Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision 15

CONCLUSION 16

INDEX TO APPENDICES

Appendix A Opinion of the Court of Appeals reported in *Murray v. Stuckey's Inc.*, 939 F.2d 614 (8th Cir. 1991) 1a

Appendix B Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc by the Court of Appeals, filed September 19, 1991 ..... 22a

TABLE OF CONTENTS – Continued

Page

Appendix C Memorandum of Law and Order of the District Court for the Northern District of Iowa, filed July 17, 1989.....23a

Appendix D Order of the District Court for the Northern District of Iowa, filed January 8, 1990.....63a

Appendix E Order of the District Court for the Northern District of Iowa, filed July 16, 1990.....71a

Appendix F Order of the District Court for the Northern District of Iowa, filed October 31, 1990.....84a

Appendix G Federal Rule of Civil Procedure 52a..89a

Appendix H Section 16 Fair Labor Standards Act..91a

Appendix I Section 13 Fair Labor Standards Act...93a

TABLE OF AUTHORITIES CITED

Page

CASES

Arnold v. Ben Kanowsky Inc., 361 U.S. 388 (1960) . . 11, 13

Brock v. Mr. W. Fireworks Inc., 814 F.2d 1042 (5th Cir. 1987), *cert. denied*, 484 U.S. 924 (1987) 12

Brock v. Norman's Country Market, Inc., 835 F.2d 823 (11th Cir. 1988) *cert. denied*, 108 S.Ct. 2845 (1988) 13

Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) 11, 12, 13

Icicle Seafoods Inc. v. Worthington, 475 U.S. 709 (1986) 9, 11, 12, 13, 15

Martin v. Cooper Electric Supply Co., 940 F.2d 896 (3rd Cir. 1991) 13

Walling v. General Industries Co., 330 U.S. 545 (1947) 9, 11, 12, 15

STATUTES

United States Code

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1337 4

29 U.S.C. § 213(a)(1), Section 13(a)(1) . . . . . *passim*

29 U.S.C. § 216(b) 4

RULES

29 C.F.R. § 541.103 . . . . . 10, 11

29 C.F.R. § 541.118 6

Federal Rule of Civil Procedure 52(a) 7, 12, 14

Rules of the Supreme Court of the United States Rule 10.1(a) and 10.1(c) 3, 15

No. _____

In The

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October Term, 1991

GLADYS MURRAY, On Behalf of Herself
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STUCKEY'S INC. and
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Respondents.

Petition For A Writ Of Certioari To The United States Court Of Appeals For The Eighth Circuit On Behalf Of Gladys Murray, And 27 Other Individuals Similarly Situated

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, filed July 25, 1991 (Rehearing Denied September 19, 1991) reversing in part the findings of fact made by the United States District Court for the Northern District of Iowa, Western Division.

OPINIONS BELOW

The Opinion of a three-judge panel of the Court of Appeals for the Eighth Circuit, reversing and remanding in part the award of the trial court, was filed July 25, 1991, was reported as *Murray v. Stuckey's Inc.*, 939 F.2d 614 (8th Cir. 1991) and is printed in the Appendix, pages 1-21a (Appendix A).

The Order of the Court of Appeals for the Eighth Circuit denying Plaintiffs' Suggestion for Rehearing En Banc by reason of a lack of a majority (with at least one Circuit Judge dissenting) and denying the Petition for Rehearing was filed September 19, 1991 and is printed in the Appendix, page 22a (Appendix B).

The trial court's unpublished opinion after trial making findings of fact that Defendants had failed to sustain their burden of proof that the Plaintiffs were exempt from the overtime provision of the Fair Labor Standards Act is dated and filed on July 17, 1989 and is printed in the Appendix, *infra* at pages 23a-62a (Appendix C).

The trial court's unpublished opinion on Plaintiffs' Motion to Alter or Amend and to Determine Attorney Fees is dated January 5, 1990 and filed on January 8, 1990 and is printed in the Appendix, pages 63a-70a (Appendix D).

The trial court's unpublished opinion awarding damages (including liquidated damages), and reducing the attorney fee award is dated July 14, 1990 and filed July 16, 1990 and is printed in the Appendix, pages 71a-83a (Appendix E).

The trial court's unpublished opinion reconsidering the attorney fee award dated January 5, 1990 (filed January 8, 1990) is dated and filed October 31, 1990 and is printed in the Appendix, pages 84a-88a (Appendix F).

JURISDICTION

The opinion of the three judge panel of the Circuit Court of Appeals is dated and was entered on July 25, 1991. The Order of the same Court denying the Suggestion for Rehearing En Banc and the Petition for Rehearing (with at least one judge dissenting) is dated and was entered September 19, 1991. This Petition is filed within ninety (90) days of that date. The statutory provision believed to confer jurisdiction on this court to review that judgment by writ of certiorari is 28 U.S.C. § 1254(1); and we believe the applicable rule of this court is Rule 10.1(a) and (c).

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

Federal Rule of Civil Procedure 52(a) (in Appendix, page 89a-90a, Appendix G)

Fair Labor Standards Act (FLSA) of 1938 as amended, now 29 U.S.C §§ 201-219, Section 16(b), (in Appendix, page 91a-92a, Appendix H).

Fair Labor Standards Act (FLSA) of 1938 as amended, 29 U.S.C. § 213(a) (1), Section 13(a) (1) (in Appendix, page 93a, Appendix I).

STATEMENT OF THE CASE

Gladys Murray and Sidney Murray on behalf of themselves and all others similarly situated brought an action against Respondents in the United States District Court for the Northern District Court of Iowa, Western Division. Jurisdiction of the district court was based upon Section 16(b) of the Fair Labor Standards Act (FLSA). (29 U.S.C. § 216(b)) and 28 U.S.C. § 1337.

The Complaint sought overtime pay, liquidated damages, attorney fees and costs under FLSA. Fifty-eight (58) additional persons consented to become party Plaintiffs, resulting in a total of sixty (60) Plaintiffs. Those sixty (60) Plaintiffs were in three categories. Those three categories included (1) so-called "managers", (2) spouses of the so-called "managers" (the spouses having been employed by the Respondents at the same time as the so-called "manager" as a part of a husband and wife team) and (3) children of the so-called "manager", those children also being employed by Respondents.

The case was tried by ordinary proceeding without a jury and judgment was entered in favor of all Plaintiffs then remaining as Plaintiffs. The claims of the children were settled prior to trial. The claims of the spouses have all either been settled or judgments entered in their behalf have been paid and satisfied. Only the claims of the twenty-eight (28) so-called "managers" remain.

All Petitioners were employed as so-called "managers" by Respondents in interstate commerce or affecting commerce. Respondent Stuckey's was engaged in the business of operating gasoline service establishments,

together with other retail operations and is an enterprise within the meaning of Section 3(s) of the Act.

As to the so-called "managers" the Respondents asserted that they were exempt from FLSA overtime requirements under Section 13(a) (1) (29 U.S.C. 213(a) (1).) That section exempts "bona fide executive, administrative or professional" employees from the overtime provisions of FLSA.

The Final Pre-Trial Order listed as a Factual Issue for both Plaintiffs and Defendants the following identical Factual Issue:

> "(1) Were the 'managers' in fact managers within the meaning of the Fair Labor Standards Act and the regulations promulgated thereunder"

The two principal factual disputes at trial were whether the "primary duty" of the so-called "managers" was management and whether the so-called "managers" regularly directed the work of two or more other employees. A third issue arose as to whether the "managers" were paid a "salary" as defined in the regulations.

On these questions the Plaintiffs presented substantial evidence that

> 1) The so-called managers spent 75%, 80%, and up to 90% of their time performing non-exempt duties.
>
> 2) Their "primary duty" was not management.
>
> 3) The duties of the so-called "manager" and the non-exempt spouse of the "manager" were essentially the same.

4) During the winter months the stores were staffed by just two persons (husband and wife – one "manager" and one hourly) in the stores.

5) At one store in 1985 during a period of 19 weeks out of 30, there was only one employee other than the manager present at the store.

6) There were deductions from the salaries for sickness (29 C.F.R. § 541.118 does not permit such deduction).

Against that background of the listing of Factual Issues by all parties in the Final Pre-Trial Order and the evidence presented, all parties having agreed that the burden of proof was on the Defendants, the trial court made findings of fact that:

"The duties of the 'manager' and 'hourly employee' were essentially the same" (Finding of Fact 17) (App. p. 27a).

and

. . . the defendants have failed to sustain their burden of proof that such employees are exempt from the overtime provisions of the Fair Labor Standards Act (Finding of Fact 29) (App. p. 37a).

and

"With respect to Plaintiffs who received a weekly salary (managers), the defendants have failed to sustain their burden of proof that the primary duty of those employees was management . . . In essence, the evidence demonstrated that the 'managers' simply took orders and had little, if any, real involvement as managers" (Finding of Fact 28) (App. p. 36a).

and

> " . . . the court is persuaded that the 'managers' did not have management as a primary duty." (Finding of Fact 28) (App. p. 37a)

Without any reference to the "clearly erroneous" standard of review of Rule 52(a) of the Federal Rules of Civil Procedure, and ignoring the case law issued by the United States Supreme Court dealing with the "clearly erroneous" standard of review in FLSA cases dealing with exemptions, a three-judge panel set aside those findings of fact, and reversed.

A Petition for Rehearing was filed. It was denied by a split vote of the Circuit.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED FOR THREE REASONS: FIRST OF ALL, THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE CONTROLLING DECISIONS OF THIS COURT. FURTHER THE OPINION OF THE EIGHTH CIRCUIT CONFLICTS WITH RECENT DECISIONS OF THE FIFTH CIRCUIT, THE THIRD CIRCUIT, AND THE ELEVENTH CIRCUIT. ADDITIONALLY THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The holding of the Eighth Circuit is in Conflict with the Decisions of this Court

This Court, on two occasions, has granted certiorari and reversed Circuit Courts of Appeals in FLSA cases

dealing with exemptions. In both of those cases the trial court had made findings of fact and held in favor of employers that the employer had carried its burden of proof on the exemption issues presented in those cases.

In both of those cases the Circuit Court of Appeals reversed the trial court. In both of those cases this Court held that the action of the Court of Appeals was reversible error and reversed the Circuit Court of Appeals.[1]

In both of those cases the trial court had made factual findings in favor of the employer. In our case the trial court found that the duties of the claimed exempt employees and admittedly non-exempt employees were essentially the same. The trial court in our case further made findings of fact that the employers had failed to sustain their burden of proof that (1) the primary duty of the petitioners herein was management and, (2) that they were exempt from the overtime provisions of FLSA. Additionally the trial court found that it was persuaded that the "managers" did not have management as a primary duty.

Petitioners herein submit that the same standard of review should be applied by the Circuit Court when the worker wins in the trial court as when the employer wins in the trial court.

---

[1] Petitioners herein are not aware of any cases in which a Circuit Court has overturned findings of fact in favor of workers by a trial court on the "executive exemption" issue or the "primary duty" issue under FLSA. Respondents cited no such cases in their brief in the Eighth Circuit.

As a matter of fact there is more reason to affirm a trial court when the trial court award is in favor of the worker than when the trial court finds in favor of the employer. First of all, the burden of proof on the exemption issue is on the employer. Secondly, the FLSA is a remedial act and exemptions are to be construed narrowly against the employer. Thirdly, exemptions are to be applied only to those clearly and unmistakably within the terms and spirit of the exemption.

Those considerations suggest that findings of fact in favor of workers should be less readily set aside than findings of fact in favor of employers.

As long ago as 1947, this Court held that the question of whether a worker falls within the exclusion for "executives" under 29 U.S.C. § 213(a) (1) is a factual question subject to the "clearly erroneous" standard of review set forth in Rule 52(a) of the Federal Rules of Civil Procedure. *See Walling v. General Industries Co.*, 330 U.S. 545 (1947), which reversed the decision of the Circuit Court.

Again in 1986, this Court reversed the Ninth Circuit because it engaged in fact-finding in a case involving an exemption under FLSA. *Icicle Seafoods Inc. v. Worthington*, 475 U.S. 709 (1986). This Court, (by Justice Rehnquist) said in reversing:

> "We think the Court of Appeals was mistaken to engage in such factfinding." at p. 714
>
> and
>
> "The question of how the respondents spent their working time aboard the *Arctic Star* is a question of fact" at p. 714.

Likewise, here, the question of primary duty is a question of fact (See 29 C.F.R. § 541.103). The burden of proof is on the employer and exemptions are to be construed narrowly against the employer. The Court of Appeals for the Eighth Circuit did not purport to set aside the findings by the trial court that (1) the duties of the claimed exempt and admittedly non-exempt employees were essentially the same, (2) that Defendants failed in their burden of proof that the workers were exempt, or (3) that the workers did not have management as a primary duty.

Unless those findings of fact are "clearly erroneous", and the three-judge panel has not said they are, (nor could it based on the record in this case) there can be no legal justification for holding that those workers are exempt under Section 13(a) (1) of the FLSA.

As a matter of fact the Eighth Circuit did not even mention those findings. It did not even mention the "clearly erroneous" standard of review.

Instead the three-judge panel discussed three different trial court opinions in which those three trial courts had held, on facts quite different from those here, that the employer had sustained its burden of proof. The findings of fact by those three trial courts, on facts quite different from this case, cannot provide the basis for holding that the findings of fact by the trial judge in our case were "clearly erroneous".

No one (neither the Defendants nor the three judge panel) has ever contended in this case, that the burden of proof was other than on the Defendants. The defendants admitted at the Final Pre-Trial Conference, as noted in the

Final Pre-Trial Order, that the question of exemption was a question of fact. The regulations with respect to "primary duty" so state. 29 C.F.R. § 541.103.

On appeal the Defendants contended, in the face of *Icicle, supra, Walling, supra,* the Pre-Trial Order, and 29 C.F.R. § 541.103, that there was a legal question. And the three-judge panel bought the argument, (notwithstanding the teaching of *Icicle, supra,* and *Walling, supra,* and notwithstanding Defendants' admission in the Final Pre-Trial Order that the question of exemption was a factual issue and notwithstanding 29 C.F.R. § 541.103)!

Finally, the panel substituted its judgment of the facts for those of the trial court, by applying a very narrow construction of the regulations against the employee and ignoring the remedial nature of the statute. See *Arnold v. Ben Kanowsky Inc.*, 361 U.S. 388 (1960). See also *Dalheim v. KDFW-TV*, 918 F.2d 1220 (5th Cir. 1990) where the court said at p. 1224:

> "The § 13(a) (1) exemptions are 'construed narrowly *against the employers* seeking to assert them; and the employer bears the burden of proving that employees are exempt." (emphasis supplied)

B. The holding of the Eighth Circuit is also in Conflict with recent Decisions in the Fifth Circuit, the Third Circuit, and the Eleventh Circuit.

The Fifth Circuit recently issued its opinion in *Dalheim v. KDFW-TV*, 918 F.2d 1220 (5th Cir. 1990). That case involved § 13(a)(1) exemptions, as does our case. A

principal issue in that case involved the question of "primary duty", as does our case. The trial court found in favor of the workers and against the employer on the "primary duty" and the exemption.

The employer invited the Fifth Circuit to set aside the trial court's findings. The Fifth Circuit declined to do so, citing *Icicle Seafoods Inc., supra,* and *Walling, supra.*

In *Dalheim, supra,* the Fifth Circuit noted (at p. 1224) that the Section 13(a)(1) exemption is to be "construed narrowly against the employer" and that the employer bears the burden of proof on the issue of exemption. The Fifth Circuit went on to state that the employer " . . . must demonstrate clear error to prevail" (p. 1226).

The court also said, in *Dalheim, supra* that:

> " . . . the . . . exemptions claimed by (the employer) requires the district court to *infer* from its findings of historical fact what constitutes the employees' 'primary duty' " (p. 1227) (emphasis supplied).

Under Rule 52(a) of the Federal Rules of Civil Procedure, inferences are for the trial court and can be set aside only if "clearly erroneous". See *Dalheim, supra,* where the court said at p. 1226:

> "For example, whether an employee's work is 'original and creative' in character and *whether such work is an employee's 'primary duty' are based on inferences from historical facts.* Such inferences are also reviewed for clear error" (emphasis supplied).

See also *Brock v. Mr. W. Fireworks Inc.,* 814 F.2d 1042 (5th Cir. 1987) at p. 1044, *cert. denied,* 484 U.S. 924 (1987) where

it is made plain that "inferences from facts . . . are questions of fact that we may set aside only if clearly erroneous", citing *Icicle, supra.*

The findings of fact by the trial court, based upon the inferences drawn by the trial court in our case, according to the doctrine of *Dalheim, supra,* can only be set aside for clear error. The Eighth Circuit in our case did not even hold that there was clear error, nor could it. The findings of fact in our case were amply supported by the evidence.

The Eighth Circuit, in reversing the trial court as to the 13(a)(1) exemption, setting aside the inferences drawn by the trial court, has clearly used a different standard of review than the Fifth Circuit in affirming the trial court in *Dalheim, supra.*

Even more recently the Third Circuit in *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896 (3rd Cir. 1991), declined to accept an employer's invitation to set aside the trial court's findings of fact in favor of workers as to a Section 13(a) (1) exemption.

In *Martin, supra,* the Third Circuit cited *Dahlheim, supra, Icicle, supra, Walling, supra,* and *Arnold, supra,* and adopted the teaching of those cases.

Additionally the Third Circuit noted that:

> " . . . if the record is unclear as to some exemption requirement, the employer will be held *not* to have satisfied its burden." (emphasis supplied)

Similarly, in *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir. 1988), *cert. denied,* 108 S.Ct. 2845

(1988) the Eleventh Circuit declined the employer's invitation to overturn the trial court's findings of fact in favor of the workers.

In that case the trial court, like the trial court here, had stated:

> "Because Defendants have *failed to sustain their burden of proving that the primary duty of these employees was the management of their departments,* the court must conclude that they are not exempt as executives under either of the regulation tests" (emphasis supplied) (p. 826).

The Eleventh Circuit noted that:

> "The burden of proving the applicability of the executive exemption is upon the Defendant. The exemption is to be applied only to those clearly and unmistakably within the terms and spirit of the exemption" (p. 826).

and then went on to hold that:

> "It has been well settled that the District Court has the opportunity to observe the witnesses and their demeanor, and is, therefore in the best position to make credibility[2] determinations, subject only to the clearly erroneous rule of Federal Rule of Civil Procedure 52(a)". (p. 826).

---

[2] Respondents' credibility was seriously at issue at trial. In response to interrogatories Respondents had claimed only four previous investigations under FLSA. Later after Plaintiffs had made Freedom of Information requests as to previous investigations, and in response to Requests for Admissions, Respondents admitted numerous additional investigations, claims, payments, and promises to comply with FLSA. (Findings of Fact 31 and 32, Appendix 39a)

C. The Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Rule 10.1(a) of the Rules of the Supreme Court of the United States suggests as one of the reasons for the grant of certiorari:

> "When a United States Court of Appeals has . . . so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Petitioners herein submit that the action of the three judge panel of the Eighth Circuit cries out for the exercise of this Court's power of supervision.

The decision of that panel in this case is not only in conflict with previous decisions of this Court (Section A of this Petition) and in conflict with other courts of appeal (Section B of this Petition). The decision of the panel has also departed from the accepted and usual course of judicial proceedings.

To the best of Petitioners' knowledge there have been no reported cases where a Court of Appeals has overturned findings of fact by the trial court in favor of workers as to "primary duty" or failure to sustain the burden of proof as to executive exemption. This is easily understandable in light of the burden of proof, the remedial nature of the statute, the strict construction *against* the employer, and the teaching of *Icicle, supra,* and *Walling, supra.*

Petitioners respectfully submit then that the three judge panel of the Eighth Circuit, under those circumstances, has dramatically departed from the accepted and

usual course of judicial proceedings. Petitioners further respectfully submit that those circumstances call for an exercise of this Court's power of supervision.

CONCLUSION

The standard of review should not be different depending on whether the employer or the worker prevailed in the trial court. Nor should the standard of review be different in the Eighth Circuit than in the Fifth Circuit, the Third Circuit, or the Eleventh Circuit. The Eighth Circuit's action so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

For those reasons Petitioners respectfully pray that this Petition for a Writ of Certiorari should be granted.

DATED at Sioux City, Iowa, December 2, 1991.

Respectfully submitted,

P. L. NYMANN
Counsel of Record for Petitioner
383-390 Orpheum Electric Bldg.
P.O. Box 1825
Sioux City, Iowa 51102
Phone: (712) 258-0101

STEVEN C. KOHL
Co-Counsel for Petitioner
383-390 Orpheum Electric Bldg.
P.O. Box 1825
Sioux City, Iowa 51102
Phone: (712) 258-0101

P. L. NYMANN
and
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On the Petition

APPENDIX

INDEX TO APPENDICES

		Page
Appendix A	Opinion of the Court of Appeals reported in *Murray v. Stuckey's Inc.*, 939 F.2d 614 (8th Cir. 1991)	1a
Appendix B	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc by the Court of Appeals, filed September 19, 1991	22a
Appendix C	Memorandum of Law and Order of the District Court for the Northern District of Iowa, filed July 17, 1989	23a
Appendix D	Order of the District Court for the Northern District of Iowa, filed January 8, 1990	63a
Appendix E	Order of the District Court for the Northern District of Iowa, filed July 16, 1990	71a
Appendix F	Order of the District Court for the Northern District of Iowa, filed October 31, 1990	84a
Appendix G	Federal Rule of Civil Procedure 52a	89a
Appendix H	Section 16 Fair Labor Standards Act	91a
Appendix I	Section 13 Fair Labor Standards Act	93a

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 90-2375, 90-2376 and 90-2897NI

Gladys Murray, on Behalf of Herself and All Others Similarly Situated, consent to become party plaintiffs: Floyd Caskey; Christine Christiansen; Allan Christiansen; Donald Scott; Roger D. Hoyt; Deborah L. Hoyt; Russell C. Renecker; Carol Renecker; Eugene A. Rutledge; Lawrence B. Taylor; Warren Kajander; Jeannette Petrimoulx; Kinney Bryant; Bettye Bryant; Carol S. Lewis; James L. Lewis; Harley Blair; Thomas Miller; Joyce Thompkins; Veralyn Blair; Sandra L. Crist, in her capacity as executrix of the estate of Kenneth L. Crist; Kenneth Crist; Rita Miller; Michael Hamilton; Anna M. Foster; Joni Bushnell; Lois Louise Phillips; Adrienne Geisenheimer; Sharon Jacoby; Bonnie Stotts; Linda M. Brown; Sandra Crist; Larry Brown; Randy Bushnell; Bobbie Cockrell; Mary T. Cope; Stanley Dixon; Thomas Foster; Edward Geisenheimer; Rae Jean Hamilton; Loren Jacoby;	*	Appeal and Cross-Appeal from the United States District Court for the Northern District of Iowa.

Donald Phillips; Joy M. Powers; Arthur Stotts; David Tompkins; Sidney Murray; Bev Caskey; Michelle Scott; Kevin Murray; Joylene Taylor; William Pohlman; Robert Pohlman; Nancy Pohlman; Robin Kajander; Tony Tompkins; Tracy Tompkins; Georgina Phillips; Tammy Moore; Bonita Dixon; Charles Brown,

Plaintiffs-Appellees
and Cross-Appellants.

v.

Stuckey's, Inc. and Pet Incorporated,

Defendants-Appellants
and Cross-Appellees.

Submitted: February 13, 1991

Filed: July 25, 1991

Before BOWMAN, MAGILL, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

Stuckey's, Inc. and its parent, Pet, Incorporated ("Stuckey's"), appeal from the district court's judgment after a bench trial awarding more than $900,000 in compensatory and liquidated damages and $142,000 in attorneys' fees to forty-five of its former store managers and

hourly employees for violations of the maximum hours (overtime) requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. Stuckey's argues that the district court erred in rejecting Stuckey's defense that the store managers were exempt executive employees, in concluding that Stuckey's violations were willful for statute of limitations purposes, in awarding liquidated damages, in failing to require adequate proof of compensatory damages by each plaintiff, and in its award of attorneys' fees. Plaintiffs have cross-appealed challenging the district court's calculation of the store managers' compensatory damages and the attorneys' fee award. For the reasons discussed below, we affirm the damage awards to the hourly employees, reverse the district court's resolution of the executive exemption issue, and remand to the district court for further proceedings.

I. Facts and Proceedings Below

During 1982-1985, the period at issue in this proceeding, Stuckey's operated roadside stores along interstate and other major highways across the United States. These stores were combination gasoline stations, convenience stores, and restaurants. Pet had acquired Stuckey's, Inc. just prior to 1982 and was attempting to reverse its lack of competitive success in the 1970s. The attempted turnaround failed, and Stuckey's stores were closed sometime after 1985.

Each Stuckey's store had an on-site store manager responsible for its day-to-day operations. Where possible, Stuckey's hired married couples who were required to live on the premises. One spouse was hired as the store

manager and received compensation on a salary basis, with the opportunity for a profit-oriented bonus; the other worked as an hourly employee, typically at or near the minimum wage. Each store manager reported to a regional manager who was responsible for 10 to 20 stores. Regional managers visited their various stores periodically and communicated with the store managers by telephone on at least a weekly basis.

In addition to managing the store's day-to-day operations, each store manager was responsible for hiring sufficient additional workers to staff the store in accordance with a labor budget furnished by Stuckey's. Stuckey's based these labor budgets on the projected volume of business in each store, which varied seasonally as well as from store to store. In these budgets, the manager was scheduled to work 60 hours per week, and his or her spouse was scheduled to work 40, or in some cases 44 hours per week.

Plaintiffs Sidney and Gladys Murray filed this action alleging that Stuckey's unlawfully failed to compensate them for the overtime that each of them worked at Stuckey's stores in Randall and Little Sioux, Iowa. Pursuant to 29 U.S.C. § 216(b), the other, similarly situated plaintiffs filed written consents and became additional parties. During the lengthy court trial, numerous plaintiffs' witnesses testified that Stuckey's labor budgets were unrealistic, so that store managers and their spouses in fact worked many additional unpaid hours "off the clock." The store manager plaintiffs testified that they were required to work as many as 120 hours per week, so that they received less than the minimum wage, in order to meet Stuckey's stated requirement that they work "as

long as it took to get the job done." The hourly employee spouses testified that they worked far more than the 40 or 44 hours for which they were scheduled and paid, and that Stuckey's regional managers refused to allow them to work paid overtime and in fact knew that these plaintiffs were working many unpaid hours to help their manager spouses "get the job done."

Stuckey's defended its practices as lawful under the FLSA. Stuckey's presented evidence intended to show that its store managers were executive employees for FLSA purposes and thus were not subject to FLSA's minimum wage and overtime requirements. In addition, numerous Stuckey's witnesses testified that the schedules were reasonable, that hourly employees were properly paid for all recorded hours, and that plaintiffs' claims of additional hours worked were grossly exaggerated. Stuckey's supervisory witnesses denied any knowledge that managers' spouses had in fact worked unpaid overtime.

After trial, the district court initially determined that the plaintiff store managers had worked more than their scheduled 60 hours per week, and that they were not exempt executives and therefore were entitled to FLSA overtime compensation for all hours worked over 40 per week. The court found that the hourly paid plaintiffs had worked substantial unpaid overtime, and that Stuckey's had discouraged these plaintiffs from reporting overtime hours and therefore knew or should have known of the overtime violations. Having concluded that Stuckey's violations were willful, the court held that the three year statute of limitations applied and that Stuckey's was liable to each plaintiff for liquidated damages in an amount

equal to the compensatory damages (the amount of the unpaid overtime).

Following further factual submissions and argument concerning the amount of damages, the district court entered two additional orders, first determining the maximum number of unpaid overtime hours worked by each group of plaintiffs, and then fixing a specific amount of damages for each plaintiff and the attorneys' fees to be awarded in favor of all plaintiffs. This appeal followed.

II. The Store Managers

Stuckey's store managers were paid a flat weekly salary, were scheduled to work a 60-hour week, and were told to work for as long as it took to "get the job done." The district court determined that this compensation arrangement was inconsistent with the FLSA's core requirement that covered employees be paid 1 1/2 times their regular rate for hours worked in excess of 40 per week.[1] Stuckey's principal argument on appeal is that the

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[1] The district court then converted this determination into damage awards in its later post-trial rulings. First, it held: "The hourly rate shall be determined by dividing the weekly rate by sixty (60) for managers . . . . Managers shall receive one half of the hourly wage in overtime pay for each of the 20 hours from 40 to 60 that they worked each week. They shall receive one and one half times the hourly wage for each hour over 60 worked each week. The maximum hours per week to be allowed in figuring overtime for managers is 70 for each week from October 1 to May 1 and 77 for each week from May 1 from [sic] October 1." Specific damages were then awarded to each store manager plaintiff in the third post-trial order of July 14, 1990. Given our resolution of the executive exemption issue, we need not consider Stuckey's challenge to these damage awards.

evidence established that the store managers were "bona fide executive" employees and were therefore exempt from FLSA's overtime requirements under Section 13(a)(1) of the Act, 29 U.S.C. § 213(a)(1).

Section 13(a)(1) expressly provides that the term "bona fide executive" shall be "defined and delimited from time to time by regulations of the Secretary" of Labor. The Secretary's regulations provide a complicated definition of an "executive employee." To establish that an employee is an exempt executive, the employer must show that the employee:

- is one whose "primary duty" consists of the management of a recognized subdivision of the employer's enterprise;
- "regularly directs the work of two or more other employees";
- "has the authority to hire or fire other employees" or makes recommendations as to hiring, firing, and promoting that are "given particular weight";
- "regularly exercises discretionary powers"; and
- devotes less than 40 percent of the work week to nonexempt activities *or* "is in sole charge of . . . a physically separated branch establishment."

29 C.F.R. § 541.1. This regulation is further complicated by a provision that employees who earn more than $250 per week need satisfy only the first two of the above requirements (the so-called "short test"), whereas employees who earn less than $250 per week must satisfy all five (the "long test"). Since some of Stuckey's store

managers fell into each earnings category during portions of the damage period, both the short test and the long test are at issue in this case.

Primary Duty. Much of the evidence at trial addressed Stuckey's contention that the plaintiff store managers' work satisfied the "primary duty" prong of the executive employee definition. Seeking to demean or minimize the importance of the manager's position, the plaintiff managers testified that most of their time was spent on routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves; that the manager's duties could be and were regularly handled by the manager's hourly-paid spouse; and that all decisions of real importance were made by Stuckey's regional managers to whom the store managers regularly reported. On the other hand, Stuckey's witnesses testified that the store managers were in charge of the day-to-day store operations, which encompassed the hiring and firing of other store employees, as well as numerous other discretionary management functions such as training and supervising store employees, ordering merchandise, handling customer complaints, and safe-guarding cash receipts.

The district court resolved this crucial issue in favor of plaintiffs, concluding that Stuckey's had failed to establish that the store managers' primary duty was management for three reasons – because the managers spent 65-90 percent of their time performing non-managerial duties, because "there were little, if any, differences in the duties of managers and their spouse hourly employees," and because "Stuckey's regional managers served as the

'real managers' of their stores." We disagree with this interpretation of the regulations.

The Secretary's regulations specifically define the primary duty concept: 29 C.F.R. § 541.103 provides that the primary duty determination "must be based on all the facts in a particular case" and that the amount of time spent on managerial duties is a relevant, but not dispositive, factor:

> In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

The district court's finding that the managers spent 65-90 percent of their time on non-managerial duties, though imprecise and unexplained, is relevant and not clearly erroneous. However, it is not a controlling factor under the regulations. As the court said in *Donovan v. Burger King Corp.*, 672 F.2d 221, 227 (1st Cir. 1982), "the person

'in charge' of a store has management as his primary duty, even though he spends the majority of his time on non-exempt work and makes few significant decisions."

The district court's second reason, that the managers and their spouses shared their duties, is in our view irrelevant to the primary duty inquiry. It is undisputed that Stuckey's only designated one employee at each store to be the manager and only seeks an executive exemption for that one designated employee. The question is whether that person, who was in charge of the day-to-day operations of an isolated gasoline station, convenience store and restaurant, had management as his or her primary duty. It is irrelevant to that question whether the manager delegated some discretionary duties, or whether other employees who reported to the manager were capable of performing part or even all of the manager's duties. The employer is still entitled under the FLSA and the regulations to have one designated exempt executive at this type of facility.[2] *See Tipple v. Affordable Inns, Inc.*, 24 Wage & Hour Cas. 975 (BNA) (W.D. Okla. 1980) (spouses were hired as "co-managers" of employer's motels; manager's duties included "complete operation of the office"; held, one spouse an exempt executive, the other entitled to FLSA damages for unpaid

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[2] The Secretary's regulations specifically warn that an employer may not expand the number of exempt supervisors beyond the amount of managerial work required. *See* 29 C.F.R. § 541.105(d). Significantly, the regulations do not provide, conversely, that an employee whose primary duty is managerial will not qualify for exempt executive status because other, non-supervisory employees are able to and sometimes do perform his or her managerial duties.

overtime). Thus, the district court erred in relying upon this factor.

We also conclude that the district court misinterpreted the Secretary's primary duty regulation in relying upon its third reason, that the regional managers were the "real managers" of Stuckey's stores. Section 541.102 of the regulations explains what types of work are exempt managerial duties. The record is clear that the store managers performed, at the local level on a day-to-day basis, the types of management tasks described in § 541.102(b). It is true that Stuckey's manufactured candy and purchased gasoline for its stores on a national basis and, like most modern retail chains, prescribed and standardized many aspects of store operations. It is also true that the regional managers actively supervised the store managers, traveling to each store from time to time and communicating by phone with store managers at least weekly to monitor compliance with Stuckey's standardized methods of operation. However, we do not believe that the local store manager's job is any less managerial for FLSA purposes simply because he or she has an active regional manager boss. Like other courts that have considered the question, we believe that the manager of a local store in a modern multi-store organization has management as his or her primary duty even though the discretion usually associated with management may be limited by the company's desire for standardization and uniformity.

In *Donovan v. Burger King Corp.*, 675 F.2d 516, 521 (2d Cir. 1982), the court concluded that the primary duty of Burger King Assistant Managers was managerial, noting that "the restaurants could not operate successfully

unless the managerial functions of Assistant Managers, such as determining amounts of food to be prepared, running cash checks, scheduling employees, keeping track of inventory, and assigning employees to particular jobs, were performed." Rejecting the Secretary's argument that all these duties were dictated by Burger King's detailed instructions, the court observed:

> We fully recognize that the economic genius of the Burger King enterprise lies in providing uniform products and service economically in many different locations and that adherence by Assistant Managers to a remarkably detailed routine is critical to commercial success. The exercise of discretion, however, even where circumscribed by prior instruction, is as critical to that success as adherence to "the book."

675 F.2d at 521-522. Under the Secretary's regulations as construed in *Burger King*, the primary duty of a local store manager is no less managerial because the store manager reports to a distant regional manager whose primary duty is to manage multiple stores at a higher level within the organization. As the court said in *Donovan v. Waffle House, Inc.*, 26 Wage & Hour Cas. (BNA) 868, 874 (N.D. Ga. 1983), "The mere fact that a superior comes in for a one- or two-day visit does not destroy the inferior's sole charge status if during the intervals when the superior is absent the inferior manager makes the decisions normally made by an executive in charge of an establishment." *See also Marshall v. Sally Beauty Co.*, 25 Wage & Hour Cas. (BNA) 672 (E.D. La. 1982).

Having concluded that the district court erred in construing the primary duty factor, we turn again to

§ 541.103 of the Secretary's regulations, which provides in part:

> [I]n some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty.

In this case, it is undisputed that the plaintiff store managers were the on-site employees ultimately responsible for the stores' operations, even though their discretion was circumscribed. Thus, their responsibilities placed them squarely within the dictates of the above regulation, as construed by *Burger King* and other decisions dealing with comparable multi-store operations. Accordingly, we conclude that the district court erred in ruling that Stuckey's failed to prove that the plaintiff store managers' primary duty was management for purposes of the first part of the "bona fide executive" test, 29 C.F.R. § 541.1(a).

Two or More Employees. To qualify for the executive exemption, Stuckey's also must prove that each store manager regularly supervised two or more employees. The district court did not reach this issue. The evidence included Stuckey's labor budget documents, which

appear to reflect that all Stuckey store managers supervised the equivalent of at least two other full-time employees at all times. Since the district court concluded that these labor budgets understated the labor needed to run the stores, it seems likely that Stuckey's met its burden of proof as to this factor. However, this was a contested issue at trial, and it appears that the district court deferred rulings on the admissibility of other evidence Stuckey's submitted on the question. Under these circumstances, it would be inappropriate for us to resolve this issue in the first instance. Accordingly, it is remanded to the district court for further consideration.

Other "Long Test" Factors. For store managers earning less than $250 per week, Stuckey's must also satisfy three other criteria to establish the § 13(a)(1) executive exemption. Two of these criteria, relating to authority to hire and fire and to the exercise of discretionary powers, were not addressed by the district court. Although the record seems clear that store managers had the authority to hire and fire other employees, and that they were "normally and recurrently . . . called upon to exercise . . . discretionary powers in the day-to-day performance of [their] duties," 29 C.F.R. § 541.107(b), we again will remand to the district court for initial consideration of these issues.

The final criterion requires that Stuckey's prove either that its store managers spent more than 60 percent of their work time on managerial duties, which the district court found they did not, or that each manager was "in sole charge of . . . a physically separated branch establishment," 29 C.F.R. § 541.1(e). The district court

concluded that the sole charge exception was not applicable "based upon the same reasoning as set forth in the court's analysis of the primary duties exception."

As defined in the regulations, the sole charge exception seems to be written for employees like these store managers. The branch being managed "must have a fixed location and must be geographically separated from other company property," 29 C.F.R. § 541.113(b). Only one person may qualify as being in sole charge of the branch establishment, but the exemption is not lost "because of an occasional visit to the branch office of the superior of the person in charge," 29 C.F.R. § 541.113(d). In order to qualify, "the employee must ordinarily be in charge of all the company activities at the location where he is employed," 29 C.F.R. § 541.113(e).

It is clear that Stuckey's store managers satisfy these sole charge standards. The store managers were ultimately in charge of all operations on the premises. The extent of their control may have been circumscribed by Stuckey's standardized methods of operation and by the supervision of the regional managers, but this typical organizational characteristic of a modern retail chain does not change the fact that the store managers were, in a very real economic sense, in "sole charge" of the local store operations. As the court said in *Waffle House, supra,* 26 Wage & Hour Cas. (BNA) at 875, "A person who, by the decisions he alone makes with the resources provided, can have a direct and substantial effect on sales and profits is in the economic sense in sole control of a profit center." Accordingly, the district court erred in determining that the store managers who earned less

than $250 per week were not in sole charge of their stores for FLSA purposes.

III. The Hourly Employees

As to the hourly employee plaintiffs, the district court found that these employees worked substantial unpaid overtime hours with the knowledge of Stuckey's regional managers who "pressured [plaintiffs] into falsifying hours of work as it pertained to overtime." Based upon these findings, the district court concluded that these plaintiffs were not limited to the overtime reflected on Stuckey's falsified records and that Stuckey's had the burden of proof as to the number of hours actually worked under *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946). On appeal, Stuckey's does not contest liability to these plaintiffs but argues that the district court misapplied *Mount Clemens* in awarding damages.

The district court's finding that these plaintiffs were pressured into not recording overtime hours worked is not clearly erroneous. Despite this proof that its overtime records were unreliable, Stuckey's contends that the district court erred in shifting the burden of proof as to hours worked (damages) because plaintiffs' evidence failed to show, *for each individual plaintiff*, "that he has in fact performed work for which he was improperly compensated and . . . the amount and extent of that work as a matter of just and reasonable inference," *Mount Clemens*, 328 U.S. at 687. Stuckey's argues that this is not a case where "pattern or practice" damage evidence is sufficient because each plaintiff's situation was different. In addition, since at least some of plaintiffs' individual estimates

of hours worked were obviously rejected by the district court, that court's failure to provide individualized findings and analysis as to the unpaid overtime hours worked by each plaintiff requires that the damage awards be reversed.

We agree with Stuckey's that *Mount Clemens* requires the plaintiff in a falsified records case to present a prima facie case as to the unpaid overtime hours worked before the burden of proof shifts to the defendant. We also agree that this burden must be met individually by each plaintiff in a case such as this where differing work situations make pattern evidence unpersuasive. Although the district court failed to articulate this portion of the *Mount Clemens* standard in its memoranda, we conclude that Stuckey's has not demonstrated on the record before us that the district court erred in its specific awards to the hourly employee plaintiffs.

In its initial decision following trial, the district court included the following finding:

> 42. The parties have advised the court during trial that, in the event that the court holds in favor of the plaintiffs, they believe they can agree upon a calculation of the amounts due each plaintiff. . . . The court . . . does not have an adequate record before it concerning the precise damages sustained by each plaintiff. Therefore, if the parties cannot reach a mutual agreement as to damages, the court will consider the damages sustained herein in light of legal precedents hereinafter set out, including the possibility of taking additional testimony.

In its second post-trial order, the district court established "the maximum hours per week to be allowed in figuring overtime" for hourly paid plaintiffs. Then, in its third order, which awarded specific dollar amounts to the eighteen plaintiffs in this category, the district court explained that plaintiffs had filed damage calculations for these plaintiffs and that Stuckey's had filed responses in which it agreed with plaintiffs' calculation of the total amounts to be awarded to sixteen plaintiffs but contested plaintiffs' damage calculations for the other two. The district court then specifically addressed Stuckey's arguments before making awards to those two plaintiffs.

On appeal, Stuckey's does not attack the specific damage calculations submitted by plaintiffs, and does not contest the district court's statement that Stuckey's agreed with those damage calculations. Moreover, Stuckey's did not include in the appeal record those portions of the trial record that would reflect how the unpaid overtime hours worked were calculated.[3] we find

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[3] The record transmitted on appeal does not contain many relevant portions of the trial record, including the pleadings that set forth the manner in which each plaintiff's damages were calculated, the trial testimony of over 40 witnesses who testified by deposition, and many trial exhibits. Rules 10(b) and 11(b) of the Federal Rules of Appellate Procedure make it clear that it is the appealing party's responsibility to ensure that relevant portions of the district court record are transmitted to the Clerk of this court. *See* 8th Cir. R. 11A, 30A. Given the crowded dockets of all the courts in this circuit, the judges of this court will seldom request the clerk of our court to request the clerk of the district court to send us relevant portions of the trial record that the parties have failed to

(Continued on following page)

no plain error in the procedure employed by the district court to resolve damages issues. Stuckey's apparently waived its objections to the specific damage awards in the trial court; in any event, the record on appeal does not permit us to conclude that the evidence was insufficient to support those specific awards. Accordingly the judgment is affirmed with respect to the hourly employees.

IV. Willful Violations and Liquidated Damages

The district court held that the three year statute of limitations is applicable because Stuckey's violations were willful. *See* 29 U.S.C. § 255(a). In addition, the district court held that plaintiffs were entitled to liquidated damages under § 216(b) because Stuckey's failed to prove that the violations were "both in good faith and predicated on such reasonable grounds that it would be unfair to impose . . . more than a compensatory verdict." Stuckey's does not – and could not – challenge these rulings with respect to the hourly paid plaintiffs whose damage awards we have affirmed.

Stuckey's does contend, however, that the district court failed to distinguish between the hourly paid employee violations, as to which Stuckey's only defense was it did not know they were occurring, and the store manager violations, as to which Stuckey's argues that it reasonably relied upon the executive exemption defense.

(Continued from previous page)

transmit. Instead, we consider the appeal on the record as prepared by the parties, which means that relevant omissions normally work to the disadvantage of the appealing party.

We agree that, as to the store managers' willfulness and good faith must be considered in the context of the claimed executive exemption defense. However, as we have reversed and remanded for further consideration of this claimed defense, we decline to consider the willfulness and good faith issues at this time.

V. The Cross Appeal

On their cross-appeal, plaintiffs contend that the district court erred by calculating the store managers' damages based on a 60 hour work week, rather then a 40 hour work week, and that their attorneys' fee award was inadequate. These issues are inextricably tied to the damage awards to the store manager plaintiffs, which we have remanded. Accordingly, we decline to consider the cross appeal issues at this time.

Conclusion

The decision of the district court awarding damages to the hourly paid plaintiffs in the amounts set forth on page 6 of its order dated July 14, 1990 is affirmed. For the reasons stated above, the decision of the district court awarding damages to the store manager plaintiffs is reversed, the award of attorneys' fees to the plaintiffs is vacated, and the cause is remanded for further proceedings consistent with this opinion. Because of the nature and complexity of the issues that may arise upon remand, we leave to the discretion of the district court whether a

new trial, or the receipt of additional evidence on any of these issues, may be appropriate.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2375/2376/2897NI

Gladys Murray, et al, Appellant, vs. Stuckey's Inc., et al, Appellee.	* * * * * * * *	Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc

Appellee/Cross-Appellant's suggestion for rehearing en banc, has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge McMillian dissented on executive exemption issue only.

Petition for rehearing is also denied.

September 19, 1991

Order Entered at the Direction of the Court.

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

071289D3

SIDNEY MURRAY and GLADYS MURRAY, on behalf of themselves and all others similarly situated, Plaintiffs, vs. STUCKEY'S, INC. and PET INCORPORATED, Defendants.	NO. C 85-4085 MEMORANDUM OF LAW AND ORDER (Filed Jul. 17, 1989)

On May 31, 1985, plaintiffs commenced this class action under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, seeking to recover additional overtime compensation and compensation for hours claimed to have been worked "off the clock." This matter was tried to the court from February 21, 1989 through February 25, 1989. The present action consists of claims by forty-five (45) former "managers" and "hourly employees" of various Stuckey's stores throughout the country. Claims of fifteen (15) of the original plaintiffs have been settled by the parties.

In rendering its decision, the court has considered the deposition testimony of forty-three (43) former "managers" and spouses, who were hourly employees, as well as deposition testimony of former regional managers and

executives of Stuckey's. Three (3) of the plaintiffs testified during the trial, as well as six (6) former Stuckey's executives and regional managers. Having considered all of the testimony, stipulations, and exhibits introduced, the court concludes that:

1. The plaintiffs (both "managers" and "hourly employees") are entitled to recover additional overtime compensation and compensation for hours that have been worked "off the clock;"

2. The parties are to submit a report as to said damages for each individual plaintiff within thirty (30) days of the receipt of this order;

3. Plaintiffs are not entitled to compensation for "sleep time;"

4. The applicable statute of limitations for damages shall be three years

5. Both defendants, Stuckey's, Inc. and Pet Incorporated, are deemed to be employers during the time they were in charge and are found responsible

6. Plaintiffs Warren Kajander and Robin Kajander are entitled to recover the sum of $1,980.90 plus interest as provided by law for medical expenses incurred during the pregnancy of Mrs. Kajander; and

7. The parties are to submit a report as to plaintiffs, reasonable attorney fees and costs of this action within thirty days of receipt of this order.

I. FINDINGS OF FACT

A. Background Information.

1. This action was filed on May 30, 1985 under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et seq.*, to recover minimum wages, unpaid wages, and overtime benefits.

2. After the filing of this action by the two named plaintiffs, fifty-eight additional persons have filed consents herein to become party plaintiffs. Dismissals have been filed with respect to fifteen plaintiffs and there are [sic] now remain [sic] forty-five plaintiffs.

3. This court has jurisdiction pursuant to 28 U.S.C. § 1337.

4. Stuckey's, Inc. ("Stuckey's") began as a corporation at some time prior to 1972. Stuckey's is a duly organized and existing corporation under the laws of Delaware and is qualified to do business in Iowa. It does business in Little Sioux, Iowa and other locations throughout the United States where it is or has been engaged in the operation of filling stations with restaurant facilities attached.

5. In 1972, Pet, Incorporated ("Pet") purchased all of the stock in Stuckey's. Pet is a duly organized and existing corporation under the laws of Delaware and is authorized to do business in Iowa.

6. Stuckey's is a wholly-owned subsidiary of Pet.

7. Both before and after the purchase, Stuckey's hired and fired employees for the outlets, supervised and controlled the work and work schedules, determined rate

and method of payment, and maintained employment records.

8. In most cases, Stuckey's staffed the stores with married couples who lived permanently on the site. The Stuckey's roadside stores sold candy, gasoline, novelties, convenience items, as well as food from a snack bar. Each store was an independent location and, by necessity, was geographically separated from other company property. In most cases the stores were in locations along the interstates or major highways.

9. The labor budget for each store was based on volume of business done by that store, and the labor budget differed from store to store. In addition, store hours, frequency and size of alleged night deliveries, number of employees, sleep allegedly had, and hours claimed to have been worked by plaintiffs differed from store to store. Weather conditions, time of year, and other factors also affected store operations.

10. At all times material hereto, defendants employed Plaintiffs Sidney Murray and Gladys Murray in and about Stuckey's Pecan Shops located in Little Sioux, Iowa, and Randall, Iowa. Said plaintiffs were involved in selling, handling, or otherwise working on goods transported in interstate commerce and, therefore, were engaged in commerce or the production of goods for commerce within the meaning of the Fair Labor Standards Act.

11. Sidney Murray and Gladys Murray (and all other plaintiffs) have been engaged by Stuckey's, at all times material herein, in the business of operating a gasoline service establishment, together with other retail

operations, with an annual gross line of sales for business done of not less than $250,000.00 exclusive of excise taxes at the retail level separately stated. Stuckey's is an enterprise engaged in commerce within the meaning of section 3(s) of the Act.

12. "Managers" were given specific labor schedules providing for a maximum of sixty hours of work for the manager to be compensated for by salary. All other employees were paid on an hourly rate.

13. The manager's spouse was an hourly employee and was in most cases scheduled to work forty hours.

14. In Stuckey's training program, store managers were instructed that overtime was to be paid to hourly employees for all hours worked over forty hours. However, the court finds that said policy was rarely followed.

15. Although defendants routinely hired husband and wife teams to operate each of their individual stores, one was designated as a "manager." The manager was paid a weekly salary, typically $210.00 per week, but ranging from $180.00 per week to $300.00 per week. The other spouse was paid at an hourly rate, typically $3.45 per hour.

16. Store managers and spouses resided permanently on the employer's premises. They were provided with a two-bedroom apartment with a full bath, kitchen, and living room.

17. The duties of the "manager" and "hourly employee" were essentially the same. For example, Russell Renecker testified that he and his wife, Carol, were hired as a "husband-and-wife team." Mr. Renecker,

a former manager, stated that "I did whatever was necessary cleaning, painting, pumping gas, et cetera – there was no essential difference in her [Carol Renecker's] duties and mine." Jeannette Petrmoulx Arbuckle also testified that she and her husband were hired as a team. Mrs. Arbuckle testified that "I was hired as a manager . . . our duties were the same." Gladys Murray also testified that she and her husband were hired as a husband-and-wife team. Initially, Mrs. Murray was hired as the manager and her husband was an hourly employee. However, on December 21, 1984, Mrs. Murray fell on the ice while performing her duties at Stuckey's and had to undergo two surgeries. Thereafter, Mr. Murray was designated as manager. However, Mrs. Murray testified that "the regional manager for Stuckey's still called for me. I performed the daily reports. I ordered. I did the paperwork in the hospital. I complained [of the situation]. They [Stuckey's] told me to get the job done or they would get someone else."

Although Stuckey's claims that there was a difference in the roles of the manager and the spouse employee, the court is not so persuaded from the evidence adduced at trial and in depositions.

18. The husband-and-wife teams were routinely told by their regional managers that they were to do whatever was necessary to get the job done and to work whatever number of hours it took to get the job done. For example, Richard Deninger, a former regional manager, testified:

> Q. Sixty. Isn't it a fact, Mr. Deninger, that you have told your store managers that they are

required to work whatever number of hours it takes to get the job done?

A. That's true.

(Deninger Dep., p. 54, lines 18-22.)

19. The spouses of the managers were routinely told that they were not to record more than forty hours (in a few instances, forty-four) as the number of hours worked. Managers were also told to report only forty hours as the number of hours they worked no matter how many more hours were actually worked.[1]

At the trial, the deposition of Floyd Caskey, a former manager and regional manager, was read into evidence. Mr. Caskey testified as follows:

Q. Sure. You say that you were told to report – this is in part C. "I was told to report my work as forty hours per week regardless of the hours actually worked." Who did you report that to?

A. Regional or – yeah, regional manager.

Q. Didn't you at times get schedules, Mr. Caskey, that would have up to sixty hours that you were expected to work?

A. Right, but I was always – when they came through with our checks they would say right on the check for forty hours.

Q. It said that on the check?

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[1] As a result, many employees punched the clock as if they were done for the day, and then continued working "off the clock" to get the work done.

A. Yes, sir. As I remember, it was on the check or on the sheet. There was a computer sheet that came with it that said forty hours.

Q. And it's your testimony that you didn't work forty hours a week?

A. No, sir, I worked more than forty hours a week.

Q. How many hours a week would you have worked while you were at the old fort [sic] store?

A. It would vary. I worked anywhere from sixty up to one hundred or more.

(Caskey Dep., p. 84, lines 18-25; p. 25, lines 1-16.) Mr. Caskey also testified as follows:

Q. Any other employee work overtime at the old fort store?

A. Not that I remember.

Q. If you would have – if someone would have worked overtime and you would have put it down on the time card, or the employee would have put it down on the time card, would they have been paid for it?

A. At that time, they would have, yes, sir. And I would have got chewed out or lost my job probably the next time it was done.

Q. But if somebody did turn in overtime while you were at old fort [sic] they would have been paid for it?

A. The first time, yes.

Q. Somebody might have said something to you?

A. Yes, I would have been reprimanded for it.

Q. Did that ever happen?

A. No, sir. I did go over my sales, I think, once, and I was told – I mean labor once, but this was straight hours; it wasn't overtime hours; and I was told it wasn't to happen, and this was, I think, when I had some painting and stuff to do.

(Caskey Dep., p. 43, lines 5-25.)

Richard Deninger, another former regional manager for Stuckey's, testified.

Q. Going back to these computer printouts which show forty hours for the manager. Do you have any reason to believe that those managers were working only forty hours per week?

A. No.

Q. In fact you would believe they were working considerably more than that, would you not?

A. Sure.

Q. Based on the duties?

A. Sure.

Q. That were assigned to them?

A. Sure.

Q. What would your best estimate be as to the number of hours the manager was working, seventy, eighty?

A. No, I don't think that much.

Q. What would your best estimate be?

Mr. LaSeur: You want to specify where?

By Mr. Nymann: Q. At Little Sioux?

A. Sixty.

(Deninger Dep., p. 53, lines 23-25; p. 54, lines 1-17.)

Marvin Mangers, a former manager and regional manager for Stuckey's, testified:

> Q. And at the same time, the managers were being told to report forty to St. Louise [sic], is that correct?
>
> A. Correct.

(Manger Dep., p. 23, lines 17-19.)

In her deposition, Carol Renecker, a spouse hourly employee, testified:

> Q. What were you told about keeping track of hours?
>
> A. I was – you know, I had forty hours and I would have to clock out, you know, at three and, you know, if I was off or if they were busy, I had to stay there until, you know, we were there or got caught up or whatever. And if I needed to go get some stuff at the store, I'd have to go, you know, go to the bank or go to the grocery store to, you know, pick up the lettuce or whatever we would need at the time; and that would be after I was clocked out, but I'd always have to make sure I clocked out at the right time.
>
> Q. Who told you that?

A. Well, my husband did because he was told that, that he couldn't go over, you know, the scheduled work hours that, you know –

Q. Was it your husband who would instruct you to do work after you'd clocked out?

A. Yeah, just whoever – you know, he was told that, you know, we had to get it done.

(Renecker Dep., p. 8, lines 5-25.)

20. With respect to the plaintiffs who were paid a weekly salary, computer printouts prepared by defendants registered forty as the number of hours for which that weekly salary was intended. However, managers who were paid a weekly salary were told that the salary was to compensate them for up to sixty hours of work per week. (*See* Exhibits 21-24.)

21. In addition to receiving weekly salary, the following managers were paid bonuses.

Name	Year Bonus Paid	Amount
Harley Blair	1983	$1,256.00
Deborah Hoyt	1983	2,433.00
Warren Kajander	last 13 weeks 1983	673.00
Carol Lewis	last 6 months 1983	1,447.00
Gladys Murray	1983	3,257.00
Jeannette Petrimoulx Arbuckle	1983	3,121.00
Mary Cope	1983	1,912.00
Randy Bushnell	last 6 months 1983	1,677.00
Stanley Dixon	first 6 months 1983	1,475.00
Loren Jacoby	1983	1,075.00
Thomas Miller	first 3 months 1983	410.00

Name	Year Bonus Paid	Amount
Donald Phillips	1983	562.00
Joy Powers	1983	1,885.00
Arthur Stotts	last 6 months 1983	1,638.00
David Tompkins	1983	2,968.00
Russell Renecker	last 6 months 1983	2,340.00
Eugene Rutledge	1983	3,767.00
Laurence Taylor	1983	2,700.00

22. Plaintiffs received their paychecks from Defendant Pet. For Example, in his deposition, Marvin Mangers testified:

> Q. While you were employed as a regional manager, from whom did you get your paycheck?
>
> A. From Pet.
>
> Q. That would be Pet, Incorporated?
>
> A. Pet, Incorporated.
>
> Q. Would that be during all the time you were employed as a regional manager?
>
> A. As a regional manager, yes.
>
> Q. Who issued the checks for the store managers?
>
> A. A lot of years I was there, they got them from Pet. They were mailed from Pet.
>
> Q. Do you remember about how long that was?
>
> A. Probably my last year and a half.
>
> Q. So that would go back about three years?

A. Yes.

Q. What about the manager's spouse, where did the check –

A. Same place.

Q. It came from Pet?

A. Yes, all payroll.

(Mangers. Dep., p. 8, lines 10-25; p. 9, lines 1-3.) The above testimony was typical of several other witnesses as well.

23. Plaintiffs received various employee benefits from Pet. For example, Pet provided health insurance benefits to Stuckey's employees.

24. Plaintiffs received a handbook entitled "You and Pet," which stated on its front page that "we are pleased that you are part of the Pet team." (Ex. 14.)

25. Plaintiffs received an employee magazine, sometimes referred to as a house organ, entitled "Pet Magazine." (Ex. 15.)

26. George Davis, the Senior Vice President of Store Operations of Stuckey's, reported to and took direction from an officer of Pet.

27. Under the FLSA, "executives" are exempt from application of the Act if they spend a certain amount of time where their primary duties are management-related as set forth in 29 C.F.R. § 541.1.[2] The time employees spend where their primary duties are not management-

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[2] *See* p. 21, *infra*, for full text of this section.

related are termed "nonexempt duties." Plaintiffs who received a weekly salary (managers) spent from 65-90% of their time performing nonexempt duties.

28. With respect to plaintiffs who received a weekly salary (managers), and are claimed by defendants to be exempt, the defendants have failed to sustain their burden of proof that the primary duty of those employees was management. For example, Russell Renecker, a former manager and regional manager, testified: "I was not free to act with Pet. Pet tied my hands as to discretion. In the latter part of '81' it started. They decided everything. . . . Management was turned over to Pet. Pet's running the show, before it had been Stuckey's running show." Similarly, Floyd Caskey, another former manager and regional manager, testified that he had to check with a regional manager to make certain he could fire an hourly employee. (*See* Floyd Caskey Dep., p. 19, lines 15-23.) Further, the Stuckey's Operational Manual (Exhibit A), specifies that regional managers are "accountable for the operation of all company operated stores," and describe the regional manager's duties as including:

> customer service, product quality, cleanliness, safety, sanitation, standards of operations, budgeting sales and expenses, public image of the stores, expense controls, daily operating procedures, obtaining supplies and equipment, maintaining equipment and real property, store management training and developing manpower capabilities to meet future expansion needs as well as recruiting manager trainees.

Exhibit A. In comparison, the same manual lists nine duties for which store managers hold primary responsibility, three of which deal with cleaning duties, others covering keeping supplies stocked, handling daily receipts "in accordance with Accounting Department or Regional Managers' instructions," answering correspondence, keeping the price book current, and training employees. (Exhibit A.)

Based on the aforementioned testimony and that of various others, the court is persuaded that the "managers" did not have management as a primary duty. In essence, the evidence demonstrated that the "managers" simply took orders and had little, if any, real involvement as managers.

29. With respect to plaintiffs who received a weekly salary (managers), and are claimed by defendants to be exempt because their primary duties were managerial or because they were in "sole charge," the defendants have failed to sustain their burden of proof that such employees are exempt from the overtime provisions of the Fair Labor Standards Act.

30. Although the defendants did pay overtime when informed by store managers that overtime had been worked, the court finds that plaintiffs were pressured into falsifying hours of work as it pertained to overtime. Defendants' witnesses testified that labor schedule guidelines were "scientifically" developed for Stuckey's and were designed to provide sufficient hours for each store to be adequately staffed based on sales volume. Defendants also contend that regional managers made additional labor money available to a store if he or she

requested it and it was justified. However, the testimony with regard to the practicalities of the labor schedule was disputed between the parties. Plaintiffs testified that the spouse and manager were each required to work anywhere from forty-five (45) hours per week up to one hundred twenty (120) hours per week to get the work done with the few other employees they could hire under the guidelines. Former Stuckey's regional managers and vice presidents testified that it would be unnecessary for managers to work in excess of sixty (60) hours per week or spouses to work in excess of forty (40) hours per week. It is relevant to note here that shortly after this lawsuit was filed, the labor schedules were increased by Stuckey's, which would further tend to support plaintiffs' contention that they were too low.

The court disagrees with the position advanced by Stuckey's regional managers and vice presidents set forth above. The court is persuaded that there were not sufficient hours projected into the labor schedule. Therefore, employees were required to work in excess of scheduled hours. The court also finds that the defendants had knowledge that plaintiffs were working in excess of their scheduled hours or in excess of the overtime for which plaintiffs were compensated by defendants. This was specifically known by many regional managers. Such knowledge is imputed to defendants. Further, the facts indicate that although some managers knew that overtime hours were being worked, said managers chose to avoid the issue altogether. (*See* Del Roush Dep., p. 43, lines 11-16; Floyd Caskey Dep., p. 62, lines 11-18; Donald Scott Dep., pp. 10-13; David Tompkins Dep., p. 9, lines

13-25; p. 10, lines 1-12; Rita Miller Dep., p. 12, lines 19-21; Georgina Philips Dep., p. 9, lines 10-20.)

The facts also revealed that several "managers" resorted to hiring hourly employees and/or others to assist them in performing various tasks and paid for the additional off-the-clock services out of their own pockets. (*See* Floyd Caskey Dep., p. 23, lines 15-16; Gladys Murray and Russell Renecker also so testified at trial.)

31. In response to interrogatories, the defendants acknowledged four (4) investigations by the Wage and Hour Division of the Department of Labor with respect to Stuckey's employees.

32. In response to Plaintiffs' Fifth and Sixth Requests for Admissions, defendants admitted numerous additional previous investigations, violations, and promises of future compliance with the Fair Labor Standards Act.

33. As a result of the investigation with respect to the location of Stuckey's, Inc. at Saint Clair, Michigan, the Wage and Hour Division of the United States Department of Labor found back wages due in the amount of $7,283.00 for two "managers." Thereafter, Stuckey's assured the Wage and Hour Division of future compliance with the Act.

34. In 1981 and again in 1984, investigations were conducted by the Wage and Hour Division of the United States Department of Labor with respect to Stuckey's stores located in Elko, Minnesota and in Carthage, Missouri. Said investigations involved charges of employees working off the clock. As a result of the investigations,

back wages were paid and future compliance with the Wage and Hour law was assured by the defendants.[3]

35. In the instant case, Johnny Brady, who was in charge of compliance with the wage and hour law, called the attention of the president of Stuckey's to the possible violations of the wage and hour law. *See* Plaintiffs' Exhibit 9 at #17 and Defendants' Exhibit R.

36. Based upon the foregoing Findings of Fact, the court finds that the violations of the Fair Labor Standards Act by the defendants were willful. Further, the court finds that defendants' failure to comply with the wage and hour law as it pertains to hours worked off the clock by "managers" and "hourly employees" demonstrates that the defendants failed to act in good faith and had no reasonable grounds for believing that they were complying with the Act. This court finds that the applicable statute of limitations is three years.

37. The court finds that neither a contract or an express agreement existed between Stuckey's and its employees providing for compensation for sleeping time.

38. The facts clearly demonstrate that managers were entitled to receive one day off every week and spouses were entitled to receive two days off each week. Additionally, the record reveals that the plaintiffs

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[3] The court is aware that these violations generally did not include "managers." However, based on all the evidence, the court concludes that the defendants knew they showed reckless disregard to the pertinent regulations and statutes involved as they pertained to "managers."

received vacation with pay each year. The court is persuaded that the plaintiffs herein do not expect to receive additional compensation for the weeks that they were on vacation. For example, Mrs. Arbuckle testified: "I can't claim for weeks that I was on vacation . . . the store wasn't open on Christmas." Thus, the court finds that plaintiffs should not be awarded any back pay for two weeks of vacation time or for Christmas Day.

39. The vast majority of the plaintiffs herein testified that they were told that they were to be on call twenty-four hours per day. However, the court is not persuaded that plaintiffs were actually told that they had to be physically present on the premises of the store twenty-four hours a day, seven days a week, fifty-two weeks a year. For example, Mrs. Arbuckle specifically testified "I was free to leave at any time if I left a [phone] number (where I could be reached) and had enough hours left in my allotment to hire someone." *See also* the depositions of Dale Roush, p. 36, lines 10-20, and Steven Lake, p. 33, lines 4-17. Based on the foregoing testimony, the court finds that there is a distinction between being required to be physically present at a store and having to leave a phone number where an employee could be reached. The court is persuaded that the latter situation is certainly typical of numerous jobs and, although it may be somewhat of an inconvenience to an employee to be required to leave a phone number where he or she can be reached in an emergency situation, it is not a wholly unreasonable request by the defendants herein. Thus, the court finds that, in reality, Stuckey's did not require their employees to be "on call twenty-four hours per day."

Accordingly, the court finds that plaintiffs were free to engage in personal activities and did so.

40. There were several witnesses who testified that Stuckey's routinely delivered candy at odd hours in the middle of the night and expected the manager to have enough help to quickly unload the truck. However, in 1982, Stuckey's began using a different trucking service, McLeans. There was testimony that McLeans routinely made deliveries during store hours and night deliveries came almost completely to a stop. *See* the deposition testimony of Richard Deninger, p. 85, lines 1-19. This finding is also supported by the deposition testimony of Donald Philips, a former store manager, who testified:

> Q. Now, when Stuckey's was delivering your candy, was the candy generally delivered during store hours?
>
> A. No, sir.
>
> Q. When was that usually delivered?
>
> A. It was always after midnight until, I think later we probably got one that was five o'clock in the morning.
>
> Q. How often would candy be delivered?
>
> A. Once a month with Stuckey's.
>
> Q. Now when McClains [sic] started delivering in Continental Divide, when you started getting deliveries from McClains [sic] –
>
> A. Yes, sir.
>
> Q. — would they usually deliver food and candy during store hours?
>
> A. Yes, sir.

Q. How often would they deliver food and candy?

A. Once a week.

Q. How often would they come on a yearly basis not during store hours?

A. McClains [sic]?

Q. Yes.

Q. [sic] I think probably only two times that they were late and that was on account of due to the weather.

(Philips Dep., p. 9, lines 23-25; p. 10, lines 1-24.) Based on the foregoing testimony, the court finds that plaintiffs' sleep was interrupted infrequently by night deliveries during the time that McLeans made said deliveries. Therefore, except as mentioned above, the court finds that plaintiffs' sleep was not interrupted by night deliveries during the time relevant to this lawsuit and, therefore, that plaintiffs shall not be compensated for their claim for interruption of sleep time.

41. The record indicates that from September 15, 1983 to July 15, 1984, Warren Kajander and Robin Kajander were employed by the defendants and while so employed they were covered by health care expense benefits provided to employees of the defendants, including pregnancy benefits. These plaintiffs did everything they could to convert their group insurance so that the medical expense of the pregnancy of Robin Kajander would be covered. The court finds that the failure of defendants to arrange the conversion of said group insurance was through no fault of the Kajanders and awards the

Kajanders the sum of $1,980.90 plus interest on said claim. *See* Warren Kajander Dep., pp. 25-28.

42. The parties have advised the court during trial that, in the event that the court holds in favor of the plaintiffs, they believe they can agree upon a calculation of the amounts due each plaintiff. The court is currently persuaded that the parties should meet and endeavor to reach an accord as to the amounts due each plaintiff based on the rulings set out herein and then prepare an exhibit reflecting the same and file that within thirty days of receipt of this order. The court is further persuaded that it does not have an adequate record before it concerning the precise damages sustained by each plaintiff. Therefore, if the parties cannot reach a mutual agreement as to damages, the court will consider the damages sustained herein in light of legal precedents hereinafter set out, including the possibility of taking additional testimony.

43. The court finds that plaintiffs are entitled to their reasonable attorney fees and costs. Accordingly, the court hereby orders the plaintiffs to submit an itemized claim for attorney fees and costs within twenty days of receipt of this order. Within ten days thereafter, the defendants shall file any objections they have to the claimed fees and costs.

44. The parties are hereby instructed to use the formula set out in the Conclusions of Law section which follows as it pertains to calculation of damages.

II. CONCLUSIONS OF LAW

A. Claims of Manager Plaintiffs.

1. Primary Duty Exception.

The issue before the court is whether or not the manager plaintiffs are exempt employees under the Fair Labor Standards Act (FLSA). Plaintiffs claim that they were not "managers" but, rather, were nothing more than "glorified gas boys" and, as such, are not exempted by the FLSA. Defendants claim that the plaintiff managers are exempt under the provisions of the FLSA because their "primary duties" were management. *See* 29 U.S.C. § 213(a)(1).

Title 29, Code of Federal Regulations, section 541.102, reads as follows:

> (a) In the usual situation the determination of whether a particular kind of work is exempt or nonexempt in nature is not difficult. In the vast majority of cases the bonafide executive employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption.
>
> (b) For example, it is generally clear that work such as the following is exempt work when it is performed by an employee within the management of his department or the supervision of the employees under him: interviewing, selecting, and training of employees; setting and adjusting the rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or

> controls; appraising their productivity and efficiency for the purposes of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

Additionally, the Secretary of Labor has established a test to apply in the determination of whether or not managers are exempt under the FSLA. The "test," codified at 29 C.F.R. § 541.1, reads as follows:

> The term "employee employed in a bona-fide executive . . . capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (a) whose primary duty constitutes of the management of the enterprise in which he is employed or of a customarily recognized department of a subdivision thereof; and
>
> (b) who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) who customarily and regularly exercises discretionary powers; and

(e) who does not devote more than 20%, or, in the case of an employee of a retail or service establishment who does not devote as much of 40%, of his hours of work in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this subsection: *provided*, that this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20% interest in the enterprise in which he is employed; and

(f) who is compensated for his services on a salary basis at a rate of not less than $155.00 per week (or $130.00 per week, if employed by other than the federal government in Puerto Rico, the Virgin Islands, or American Samona), exclusive of board, lodging or other facilities: *provided*, that an employee who is compensated on a salary basis at a rate of not less than $250.00 per week (or $200.00 per week, if employed by other than the federal government in Puerto Rico, the Virgin Islands or American Samona), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

It is necessary for the court to apply both the "long test," subparts (a) through (e), and the "short test," subsection (f), in determining whether managers in this case are exempt under the FLSA. The court has applied the long test for those earning less than $250.00 per week and the short test for those earning more than $250.00 per week. It is undisputed that all managers of Stuckey's stores were paid at least $155.00 per week. Evidence demonstrates that pay rates ranged from $180.00 per week to $300.00 per week.

Under either test it is important to determine if an employee's "primary duty" was management. Section 541.103 of Title 29, Code of Federal Regulations, sets forth the factors to consider for the "primary duty" analysis. Section 541.103 reads as follows:

> A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50%, of the employee's time. Thus, an employee who spends over 50% of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50% of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support

> such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

Defendants contend that the evidence presented at trial demonstrated that one manager was hired by Stuckey's for each store. Also, defendants argue that each manager was responsible for all aspects of his or her store. The facts indicated that the store manager lived at the store and reported to a regional manager who did not live at the store. Defendants contend that although the regional manager made occasional visits to each store and was in contact by telephone on a weekly basis, it was not the regional manager, but the store manager, who controlled the daily operations of the store. For example, defendants argue that Gladys Murray, Jeannette Petromoulx Arbuckle, and Russell Renecker all testified that they hired and fired employees, trained, supervised, and disciplined employees, maintained inventory, produced daily, weekly, and monthly financial reports, and supervised other aspects of store operations. Based on these facts, defendants argue that the managers are "executives" under 29 U.S.C. § 213(a)(1). Further, defendants argue that despite the testimony of the managers that they performed various routine duties and were "nothing more than glorified gas boys," the fact that their primary duty was management requires that they be exempt from coverage under the FLSA.

Defendants contend that their position is in line with numerous cases in which employees performed similar tasks and were vested with the same responsibilities as the store managers employed herein. For example, in *Tippie v. Affordable Ends*, 24 W.H.Cases 975 (W.D. Okla. 1980), husband-and-wife teams were hired to manage motels for the employer. They were required to live on the motel premises and were not permitted to move to private dwellings. *Id.* at 979. The managers' duties in *Tippie* included answering telephone calls; preparing reports and following procedures set out in the operations manual; selecting, training, and supervising employees (including their spouses); light, general maintenance of the entire grounds and building; general maintenance of motel equipment; general grounds cleaning; purchasing supplies as directed; and accepting responsibility for all incidents that arose at the motel. *Id.* Thus, defendants argue that the managers in *Tippie*, like the managers in this case, were operating all aspects of the motel for their employer. *See also Lyles v. K-Mart Corp.*, 519 F. Supp. 756, 761 (M.D. Fla. 1981) (despite employees' claims that they spent 80-90% of time performing nonexempt work, the court focuses on the overall employment picture in which the same employees engaged in managerial duties such as selecting and training of employees, directing their work, maintaining their production or sales records for use and supervision or control, handling complaints and grievances and disciplining employees when necessary, planning the work needed to be done, determining the techniques to be used, and apportioning work among employees); *Wirtz v. Arcata Plywood Corp.*, 18 W.H.Cases 720 (E.D. Cal. 1969) (exempt manager of data

processing department spent very little time actually directing other employees, but was nevertheless the only manager of the department and the only person who gave department employees their work instructions).

Plaintiffs point out that the burden of proving the applicability of the executive exemption is upon the defendants. Plaintiffs further contend that the exemption is to be applied only in those clearly and unmistakably within the terms and spirit of the exemption. *See Lyles v. K-Mart Corp.*, 519 F. Supp. 756, 760 (M.D. Fla. 1981); *Donovan v. Williams Chemical Co., Inc.*, 682 F.2d 185, 191 (8th Cir. 1982); *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir.), *cert. denied*, 108 S.Ct. 2845 (1988). Plaintiffs further contend that defendants have failed in their burden of proof to show that the primary duty of the "so-called managers" was management. Plaintiffs argue that the evidence herein demonstrates that their primary duties were not management of the stores and that there were not any real differences in the duties of managers and their spouse hourly employees. Plaintiffs further argue that the evidence showing "no real difference" is reinforced by the fact that, in a number of instances when a "manager" became ill or was injured, said manager was replaced by his or her spouse who then acted as "manager."

The court is persuaded that plaintiffs, argument has merit. Accordingly, the court finds that there were little, if any, differences in the duties of managers and their spouse hourly employees. The court also finds that managers and their spouse hourly employees were equally capable of performing all duties and generally shared these functions. Further, the court is persuaded that

defendants also recognize the fact that there were "no real differences" between the roles played by their managers and spouse employees. For example, the evidence at trial revealed that Stuckey's assigned Gladys Murray, the store manager of a Stuckey's located in Randall, Iowa, to fill in as a temporary manager of a Stuckey's store located in Elko, Minnesota. Mrs. Murray was reassigned to the Elko store while the manager of the Elko Stuckey's took leave for vacation. Thus, while Gladys Murray served as the temporary manager in the Elko store, the Randall Stuckey's was left without a "manager." The evidence further revealed that Mr. Murray, an hourly employee, functioned as manager of the Randall, Iowa Stuckey's in his wife's absence. Further, although Mr. Murray functioned as the Randall Stuckey's manager, he was paid an hourly wage during that time. Thus, based upon these facts and other relevant evidence adduced at trial, the court is persuaded that Stuckey's perceived "no real differences" in the primary duties of its managers and spouse hourly employees.

The court is persuaded that Stuckey's regional managers served as the "real managers" of their stores. The evidence demonstrates that regional managers were the individuals who made the vast majority of the "significant decisions" concerning Stuckey's operations. For example, the regional managers decided the number of employees needed at a particular store; whether overtime hours were necessary (the evidence showed that if overtime was turned in by a particular store manager, the regional manager would reprimand said manager); store

hours; gasoline prices; from where to order various supplies; et cetera. For support of this, *see* Exhibits A-7, A-19, A-21, I, N, and Q.

Although the defendants cite numerous cases which they believe lend support to their position, the court believes that the decision set forth in *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir.), *cert. denied*, 108 S.Ct. 2845 (1988), is most applicable to the facts herein. In *Brock*, at 826, the court stated:

> The burden of proving the applicability of the executive exemption is upon the defendant. The exemption is to be applied only to those clearly and unmistakably within the terms and spirit of the exemption. [Citation omitted.] The trial court held Norman did not discharge his burden of proof, and in doing so made many credibility determinations.
>
> The district court stated: "Because defendants have failed to sustain their burden of proving that the primary duty of these employees was the management of their departments, the court must conclude that they are not exempt as executives under either of the regulations tests." Although it was not necessary for the district court to examine Norman's claims under both tests, it nevertheless did. [Footnote omitted.] It has been well settled that the district court has the opportunity to observe the witnesses and their demeanor, and is, therefore, in the best position to make credibility determinations, subject only to the clearly erroneous rule of Federal Rule of Civil Procedure 52(a). [Citations omitted.]

> After carefully reviewing the record, we agree with the district court's determination. The employees in question were nothing more than "working foremen." Although each of them may have had a duty which is normally recognized as that of a manager's responsibility, looking at each one individually and at the actual work performed, we cannot say they qualified as a "bonafide executive."

As set out on page 22, *infra*, section 541.103 of Title 29, Code of Federal Regulations, reads: "A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case." The court is persuaded that the facts of the instant case clearly warrant a finding that the manager plaintiffs, primary duties were not management. Accordingly, the court finds that the defendants have failed in their burden of proof as it relates to "the primary duty exception."

2. Sole Charge Exception.

Defendants also argued at trial that the "manager" plaintiffs are exempt under the FLSA because they were in "sole charge" of the stores as set forth in 29 C.F.R. § 541.1(e).[4] Based upon the same reasoning as set forth in the court's analysis of the primary duties exception, the court finds that the "sole charge" exception is not applicable to the facts herein. Therefore, the court will not further belabor the point.

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[4] *See* p. 21, *supra*, for full text of this section.

B. Claims of Hourly Employees.

In the instant case, spouse hourly employees claim that they are entitled to be compensated for additional hours for work "off the clock." In *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 686-88 (1946), the Court stated:

> The Sixth Circuit Court of Appeals made a careful examination of the master's findings and conclusions, holding that they were all supported by substantial evidence and were not clearly erroneous. It stated that the district court erred in failing to accept the finding of the master that productive work did not actually start until the scheduled time and that the formula devised for computing additional productive work was unsustainable because based upon surmise and conjecture. The Court of Appeals further held that the burden rested upon the employees to prove by a preponderance of the evidence that they did not receive the wages to which they were entitled under the Act and to show by evidence rather than by conjecture the extent of overtime work, it being insufficient for them merely to offer an estimated average of overtime work. The cause of action accordingly was ordered to be dismissed. 149 F.2d 461.
>
> But we believe that the Circuit Court of Appeals, as well as the master, imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act. An employee who brings suit under section 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation,

together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under section 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and the amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precide [sic] extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he

> proves that he has in fact performed work for which he was improperly compensated and if he produces the sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

See also Rural Fire Protection Co. v. Hepp, 266 F.2d 355, 359 (9th Cir. 1966).

In *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973), the court stated:

> The trial court found that "the defendants, district representatives, field representatives, and certain of the side telephone collection men regularly worked in excess of forty hours per week, but with rare exceptions, were only allowed to turn in, record, and be paid for forty to forty-two hours." We interpret this finding to mean that as a general rule this type of GMAC employee worked unreported overtime hours. The court's finding is not clearly erroneous, for evidence in the record supports such a conclusion. Sixteen employees testified that they worked unreported hours of overtime. Furthermore, a government investigator interviewed six employees, examined GMAC records and concluded that GMAC employees in this type of job consistently failed to report all of the overtime hours worked. From these two sources, the

> employees, testimony and the investigator's testimony, the trial court might well have concluded that plaintiff had established a prima facie case that all thirty-seven employees had worked unreported hours. At that point the burden of proof shifted to the defendant, and it was his obligation to show which of the employees had reported all overtime hours. Appellant produced ten such employees and the trial court accordingly omitted them and one other from its award. The ten men who reported all overtime hours were those who resisted the "pervasive effect" of the supervisors, instructions.

In the instant case, the court finds that supervisors were pressuring employees into falsifying their records rather than encouraging truthful reported of overtime hours. Under these circumstances, the court finds that the burden of proof shifted to the defendants, and it was their obligation to show which of the employees had reported all overtime hours. *See Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973).

C. Twenty-four Hour Pay Claims.

Section 785.23 of Title 29, Code of Federal Regulations, reads as follows:

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own.

Plaintiffs contend that 29 C.F.R. § 785.23 must be read in conjunction with 29 C.F.R. § 785.22. The court is not so persuaded. Section 785.22 reads:

> (a) *General.* Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bonafide meal periods and a bonafide regularly scheduled sleeping period of not more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. . . .
>
> (b) *Interruptions of sleep.* If the sleeping period is interrupted by call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted.

As set forth in the Findings of Fact above, Stuckey's did not require its employees to be on duty twenty-four hours a day. Further, record reveals that plaintiffs were able to pursue outside lives and engage in activities unrelated to work. These facts alone are enough to establish that under the FLSA the plaintiffs, sleeping time for each night during the period in question should be excluded from compensation. *See Rural Fire Protection v. Hepp*, 366 F.2d 355, 360 (9th Cir. 1966). Further, although the plaintiffs, testimony regarding interruptions during sleeping time also varies greatly, the record reveals that the delivery service, McLeans, which began delivering for Stuckey's sometime in 1982, rarely, if ever, made night

deliveries. Therefore, the court finds that, under the normal, usual circumstances, the plaintiffs slept uninterrupted despite occasional evening deliveries or calls. Accordingly, the plaintiffs, claim for compensation for twenty-four hours per day must fail.

D. Statute of Limitations.

The burden of proof is upon the defendants to prove that their failure to obey the FLSA was both in good faith and predicated on such reasonable grounds that it would be unfair to impose upon them more than a compensatory verdict. *See* 29 U.S.C. § 260; *Brock v. Shirk*, 833 F.2d 1326 (9th Cir. 1987), *vacated and remanded on other grounds*, 109 S. Ct. 38 (1988). They did not meet this burden.

Based on all the evidence, the court concludes that since the defendants either knew or showed reckless disregard for the matter of whether their conduct was prohibited by statute, the applicable statute of limitations is three years. *See* 29 U.S.C. § 255. *See also McLaughlin v. Richland Shoe Co.*, 108 Lab. Cas. (CCH) ¶ 35,067, 108 S.Ct. 1677 (1988); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973).

E. Liability of Defendants

An employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee. *See* 29 U.S.C. § 203(d). Under the Findings of Fact set out above, Pet, Incorporated is an "employer" and under the Fair Labor Standards Act along with

Stuckey's Inc., *See Hodson v. Servomation-Ajax Co., Inc.*, 323 F. Supp. 1047 (N.D. Miss. 1971).

F. **Damages.**

The court provides the following formula for calculating the amount of overtime due the plaintiffs herein. The hourly rate shall be determined by dividing the weekly rate by sixty (60) for managers and forty (40) for hourly employees to arrive at the hourly rate (in no event shall the hourly rate be less than minimum wage) of pay and then mu'tiplying the hourly rate of pay by one and one-half to arrive at the overtime rate. *See* 29 C.F.R. § 778.113(a), (b). *See also Oliver v. Mercy Medical Center, Inc.*, 695 F.2d 379 (9th Cir. 1982). The court further finds that bonuses paid to "managers" must to totaled with other earnings to determine the regular rate on which overtime pay must be based. *See* 29 C.F.R. § 778.203. Fringe benefits such as paid vacations and paid holidays shall be excluded in calculating damages herein. Some spouses were paid for 44 hours, and credit will be given to defendants in those instances.

Defendants are liable to plaintiffs for reasonable attorney fees and costs of the action. *See* 29 U.S.C. § 216(b).

Counsel for both parties are ordered to meet within twenty (20) days and endeavor to reach accord as to the amount of the monetary judgment to which each particular plaintiff is entitled, and within ten (10) days thereafter, prepare an exhibit reflecting the same.

Likewise, counsel are to endeavor to agree on the issue of attorney fees, but if unable to do so, the court will set the matter for an evidentiary hearing at a later date.

The court shall retain jurisdiction to determine the amount of the final judgments to be entered herein in the event the parties are unable to agree on said amounts.

IT IS SO ORDERED this 17th day of July, 1989.

/s/ Donald E. O'Brien
Donald E. O'Brien,
Chief Judge
UNITED STATES
DISTRICT COURT

Copies mailed by regular mail on July 17, 1989 to:
PL Nymann; Steven C Kohl; PO Box 1825; Sioux City, Iowa 51102
Gene R LaSuer; Jean McNeil; 2300 Financial Center; Des Moines, Iowa 50309

/s/ J. Hoch
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SIDNEY MURRAY and GLADYS MURRAY, On Behalf of Themselves and All Others Similarly Situated,	*	
Plaintiffs,	*	CIVIL NO. 85-4085
vs.	*	
STUCKEY'S INC. and PET INCORPORATED,	*	
Defendants.	*	ORDER (Filed Jan. 8, 1990)

Plaintiffs' motions to alter or amend the court's order and to determine attorney fees bring this matter before the court. After considering the written and oral arguments, the court denies in part and grants in part the plaintiffs' motion to alter or amend. The court also determines that plaintiffs' counsel should be awarded $142,308.21 in attorney fees and expenses.

Wage Calculation

In addressing the issue of damages in this case this court said:

> The court provides the following formula for calculating the amount of overtime due the plaintiffs herein. The hourly rate shall be determined by dividing the weekly rate by sixty (60) for managers and forty (40) for hourly

> employees to arrive at the hourly rate (in no event shall the hourly rate be less than minimum wage) of pay and then multiplying the hourly rate of pay by one and one-half to arrive at the overtime rate. *See* 29 C.F.R. § 778.113(a), (b). *See also Oliver v Mercy Medical Center, Inc.*, 695 F2d 379 (9th Cir. 1982). The court further finds that bonuses paid to "managers" must be totaled with other earnings to determine the regular rate on which overtime pay must be based. *See* 29 C.F.R. § 778.203.

Murray v. Stuckey's, Inc., No. 85-4085, slip op at 34 (ND Iowa, July 17, 1989). The plaintiffs now ask that "forty (40)" be substituted for "sixty (60)" in the formula. Their main concern is that division by 60 instead of 40 will, in some cases, result in hourly wages below the minimum wage. This court finds that 60 was and still is the appropriate number for the calculation. For those cases in which division by 60 produces a wage below the minimum of $3.35 per hour, the wage shall be adjusted up to $3.35 per hour.

Bonuses per hour shall be determined by dividing the total year's bonus by 2000 (50 weeks/year x 40 hours/week). Bonuses per hour shall then be added to the wage rate calculated by using the formula set out above or $3.35 whichever is higher. The sum of bonuses per hour and the wage rate provides the hourly wage for use in determining overtime pay.

Managers shall receive one half of the hourly wage in overtime pay for each of the 20 hours from 40 to 60 that they worked each week. They shall receive one and one half times the hourly wage for each hour over 60 worked each week. The maximum hours per week to be allowed

in figuring overtime for managers is 70 for each week from October 1 to May 1 and 77 for each week from May 1 to October 1.

All other employees shall receive one and one half times the hourly wage for each hour over 40 per week for which they were not paid. Those spouses who were paid for 44 hours per week shall receive time and a half for each hour over 44. The maximum hours per week to be allowed in figuring overtime for non-manager spouses is 60 for each week from October 1 to May 1 and 66 for each week from May 1 to October 1. The maximum hours per week to be allowed in figuring overtime for non-manager, non-spouses is 60 for each week from October 1 to May 1 and 60 for each week from May 1 to October 1.

The court notes here, as it did in its earlier order, that the applicable statute of limitations in this case is three years, not two. See *Murray v Stuckey's, Inc.*, No. 85-4085, slip op. at p 33 (ND Iowa, July 17, 1989).

Liquidated Damages

The plaintiffs ask that the court expressly find that they are entitled to liquidated damages. Employers who violate the Fair Labor Standards Act's (FLSA) overtime compensation provisions are liable to employees for the unpaid overtime compensation and for liquidated damages in an equal amount. 29 USC § 216(b). Nevertheless, the court may refuse to award liquidated damages "If the employer shows to the satisfaction of the court that the act or omission . . . was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . ."

29 USC § 260. This court noted in its earlier order that the "burden of proof is upon the defendants to prove that their failure to obey the FLSA was both in good faith and predicated on such reasonable grounds that it would be unfair to impose upon them more than a compensatory verdict. . . . They did not meet this burden." *Murray*, slip op. at p 33. The defendants are therefore liable to the plaintiffs for liquidated damages under 29 USC § 216(b) in an amount equal to the back pay liability.

Attorney Fees

Section 16(b) of the Fair Labor Standards Act, 29 USC 216(b), provides that "[t]he court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant . . . " In presenting their view of a reasonable fee, plaintiffs' counsel rely heavily on their contingency contract with their clients. "The existence of a contingency contract may be considered by a district court as an element to be considered in determining the market value of an attorney's services, but the court is not bound in any sense by that agreement." *United Slate, Tile and Composition Roofers v G & M Roofing and Sheet Metal Company, Inc.*, 732 F2d 495, 504 (6th Cir 1984). The fee award in this case takes the place of the one-third portion that plaintiffs' counsel were to receive under their contingency agreement: plaintiffs' counsel can now recover nothing from their clients under that agreement.

In determining a reasonable fee, this court started with the number of hours plaintiffs' counsel spent on this case and multiplied it by a reasonable hourly rate. See

Hensley v Eckerhart, 461 US 424, 433 (1983).[1] Plaintiffs' counsel filed their time sheets for this case. The court finds that Mr. Nymann spent a total of 1073.5 hours on the case. Mr. Kohl worked 337.4 hours. The *Hensley* court held that the "party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." *Hensley*, 461 US at 433. Plaintiffs' counsel did not provide with their listing of time spent any indication of their normal hourly rates. Nevertheless, during the hearing on this matter, Mr. Kohl testified that his rate for cases of this type is $70 to $75 per hour. He said Mr. Nymann's rate is $75 to $80 per hour. The court finds $70 to be a reasonable hourly rate for Mr. Kohl[2] $80 is a reasonable hourly rate for Mr. Nymann. Based on these figures, the court estimates the value of Mr. Kohl's services as $23,618 and Mr. Nymann's as $85,880.

The calculation, however, does not end with these estimates. "The district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.' " *Hensley*, 461 US at 434. The defendants have objected that plaintiffs' counsel have requested payment for time spent on trips to the courthouse to file documents – trips that did not require a lawyer's services. The court is persuaded that under *Hensley* it must disallow these items. Mr. Kohl made 33 such trips; Mr. Nymann

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[1] Though *Hensley* was a civil rights case, the court noted that its standards for determining a reasonable attorney fee "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley*, 461 US at 433, n 7.

[2] Mr. Kohl testified that early on in this case his hourly fee was less.

made seven. They generally allotted .3 hours for each of these trips. Accordingly, Mr. Kohl's fee is reduced by $693, Mr. Nymann's by $168.

In addition, defendants point out that Mr. and Mrs. Kajander's claim for medical benefits does not fall under the Fair Labor Standards Act's provisions for award of attorney's fees. Any time spent on these claims should be deducted from the fee award. Mr. Kohl allots .6 hours to the Kajanders' claim, and Mr. Nymann allots 9.9 hours. Therefore, Mr. Kohl's fee is reduced by $42 and Mr. Nymann's by $792.

After the hearing to determine attorney fees in this case, plaintiffs' counsel filed time sheets setting out an additional 24.3 hours which appear to have been spent mainly in pursuing this fee application. A court may award fees for services performed in litigating an attorney fee claim. *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F2d 236, 239 (8th Cir 1982). Therefore, Mr. Nymann's fee set out above should be increased by $872 for the 10.9 hours set out in the supplemental fee claim. Mr. Kohl's fee is increased by $938 for his additional 13.4 hours.

With these additions and deductions, Mr. Kohl's fee comes to $23,821 and Mr. Nymann's fee is $85,792. The *Hensley* court noted that other factors may warrant an additional upward or downard [sic] adjustment of the fee. *Hensley*, 461 US at 434. In *Blum v. Stenson*, 465 US 886, 897 (1984), the court repeated its view that the product of the claimed rate and reasonable hours is presumed to be the reasonable fee but rejected the argument that an upward adjustment is never permissible. The court, however, did not address whether the risk of not being the

prevailing party, and therefore not being entitled to an award of attorney's fees, may justify an upward fee adjustment. See *Id.* at 901, n 17. Included within the risk factor of not prevailing, especially in lengthy litigation, is a delay in payment factor. Justice Brennan, in his concurrence, addressed these issues and concluded that "upward adjustments to compensate for the contingent nature of success, and thus for the risk of nonpayment in a particular case" are appropriate and consistent with the court's ruling. *Blum*, 465 US at 903. This court finds that the record in this case supports an upward adjustment of 15% for the contingency risk of not prevailing and for the delay in payment factor. With this upward adjustment, Mr. Kohl's fee becomes $27,394 and Mr. Nymann's fee becomes $98,661.

Finally, plaintiffs' counsel have set out $16,253.21 in itemized expenses. Of this amount, $4553.65 is attributable to expert witness fees for two attorneys who testified at the hearing on attorney fees. Plaintiffs' counsel attempted to demonstrate through this expert testimony that the appropriate hourly rate for this case, based on contingency fee rates, should be anywhere from $250 per hour to $2500 per hour. On this basis, one of the experts estimated that a fair and reasonable attorney fee for this case would be $900,000. This court is not persuaded that it should accept the calculations offered by the expert witnesses, but it does find that it was appropriate to present such evidence, and the amounts paid for such services were reasonable under the circumstances. Thus, the plaintiffs' counsel should receive $16,253.21 for their itemized expenses.

Conclusion

Accordingly, IT IS ORDERED:

1. Plaintiffs' request that the formula for figuring managers' hourly rate be amended is denied.

2. Plaintiffs' request for an express finding that they are entitled to liquidated damages in an amount equal to the backpay liability under 29 USC § 216(b) is granted.

3. Plaintiffs' counsel are awarded $142,308.21 for their services and expenses: $27,394 for Mr. Kohl's services; $98,661 for Nymann's services; and $16,253.21 in expenses.

January 5, 1990.

/s/ Donald E. O'Brien
Donald E. O'Brien, Judge
UNITED STATES
DISTRICT COURT

Copies mailed by regular mail w/Judgment January 8, 1989 to:

P.L. Nymann; Steven Kohl; PO Box 1825; Sioux City, IA 51102

Gene LaSuer; Jean McNeil; 2300 Financial Center; Des Moines, IA 50309

John Renick; 2730 North Ballas Road; Suite 200 St Louis, MO 63121

/s/ J Hoch
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SIDNEY MURRAY and GLADYS MURRAY, On Behalf of Themselves and All Others Similarly Situated,	*	Civil No. 85-4085
Plaintiffs,	*	Order
vs.	*	
STUCKEY'S INC. and PET INCORPORATED,	*	(Filed Jul. 16, 1990)
Defendants.	*	

Several posttrial motions bring this matter before the court: (1) defendants' resisted motion to amend findings of fact and conclusions of law or for new trial; (2) plaintiff's motions to strike the defendants' replies to the plaintiffs' damage calculations; (3) plaintiffs' resisted damage calculations for plaintiffs who were paid by the hour; (4) plaintiffs' resisted damage calculations for plaintiffs who were paid a weekly salary; and (5) defendants' resisted motion to stay execution for seven days following the court's ruling on these posttrial motions. After considering the arguments on these motions, the court denies the motion to amend in part and grants it in part, denies the motion to strike defendants' replies, sets out the amount to be awarded each plaintiff, and grants the motion for stay of execution. The court also orders the

parties to file briefs on the issue of a possible enhancement of attorney fees.

I. Defendants' Motion to Amend Findings of Fact and Conclusions of Law or for New Trial

The defendants' motion and oral arguments on the motion raised three principal issues.

A. Executive Exemption

The defendants contend that the court erred in finding that the manager plaintiffs' primary duties were not management. Instead, according to the defendants, these plaintiffs were responsible for isolated stores, they hired and fired employees, they received bonuses, and performed other functions indicative of management responsibilities. On that basis, the defendants argue that these plaintiffs fall within the Fair Labor Standards Act's (FLSA) executive exemption. 29 USC § 213(a)(1).

The defendants cite *Tippie v Affordable Inns*, 24 WH Cases (BNA) 975 (W D Okla 1980), to support their argument that these plaintiffs are exempt from the FLSA. *Tippie* involved husband-and-wife teams hired to manage motels and perform some of the same functions as the plaintiffs here. The court's opinion in *Tippie*, however, mentions no regional manager structure comparable to that employed by Stuckey's. As this court pointed out in its memorandum opinion and order:

> The court is persuaded that Stuckey's regional managers served as the "real managers" of their stores. The evidence demonstrates that regional

> managers were the individuals who made the vast majority of the "significant decisions" concerning Stuckey's operations. For example, the regional managers decided the number of employees needed at a particular store; whether overtime hours were necessary (the evidence showed that if overtime was turned in by a particular store manager, the regional manager would reprimand [the store] manager); store hours; gasoline prices; from where to order various supplies; . . . For support of this, see Exhibits A-7, A-19, A-21, I, N, and Q.

Murray, et al. v Stuckey's et al., Memorandum of Law, p 27-28 (N D Iowa, July 17, 1989).

Exemptions to the FLSA are to be narrowly construed, and the defendants bear the burden of establishing exemptions affirmatively and clearly. *Brock v Norman's Country Market, Inc.*, 835 F2d 823, 826 (11th Cir 1988); *Donovan v Williams Chemical Co., Inc.*, 682 F2d 185, 191 (8th Cir 1982). The defendants have not carried that burden; their motion on this issue is denied.

B. Number of Hours Worked

The defendants argue that the plaintiffs have not carried their burden of proof regarding the number of hours worked. This court pointed out in its memorandum opinion, however, that "supervisors were pressuring employees into falsifying their records rather than encouraging truthful report[ing] of overtime hours." *Murray*, Memorandum of Law, p 31. The burden of proof regarding the number of hours worked had shifted to the defendants; they were obliged to show which of the

employees had reported all overtime hours. See *Brennan v General Motors Acceptance Corp.*, 482 F2d 825 (5th Cir 1973). The defendants did not carry that burden, and their motion to amend on this issue is denied.

C. Attorney Fees and Expenses

The defendants ask that the court amend its award of attorney fees and expenses. This court awarded $126,055 in attorney fees and $16,253.21 in expenses to the plaintiffs. The defendants now argue that $20,000 should be deducted from the attorney fee award as a credit for attorney fees previously paid to the plaintiffs' attorneys for services to plaintiffs who settled their claims before trial. This previous payment had not been mentioned by either party prior to the order on fees. The defendants note that the plaintiffs' attorneys, in submitting their time records for their fee claim, did not reduce their hours for services provided to the plaintiffs who settled. Without the $20,000 reduction, say the defendants, the plaintiffs' attorneys would be paid twice for some hours.

In resisting the reduction in their fee, the plaintiffs' attorneys have filed a summary of the settlement agreement. That agreement allotted $19,737.50 to attorney fees. Plaintiffs' attornies [sic] have no persuasive argument for not counting the earlier payment. To avoid the double payment of fees of which the defendants complain, the court deems it appropriate to amend the fee award by deducting $19,737.50.

Until the parties submitted the damage calculations in this case, the court had not been fully alerted to the

extent of the plaintiffs' success and recovery. In light of the nearly $950,000 award of damages set out in this order, the court deems it appropriate to revisit one aspect of the attorney fee claim – the possibility of a fee enhancement due to the plaintiffs' exceptional success in this case. See, for example, *Richardson v Restaurant Marketing Associates, Inc.*, 527 F Supp 690, 702 (ND Cal 1981). The court is considering an enhancement of $50,000 in the attorney fee award. Though the parties have made several filings on the attorney fees issue, none appears to directly address this issue of the possibility of a fee enhancement for exceptional success. The court therefore requests that the parties file their views on this matter in compliance with the schedule set out below.

The court also awarded $16,253.21 in expenses to the plaintiffs. According to the defendants, $2,694.75 of the expenses claimed by the plaintiffs were for the plaintiffs' own travel, motel, and meal expenses and for loss of work. The defendants argue that the plaintiffs were, in effect, paying themselves to attend the trial of this matter. The court deems it appropriate to reduce the award of expenses by the requested $2,694.75. The plaintiffs should receive $13,558.46 for their expenses.

D. Summary

The defendants' motion to amend is granted to the extent that the attorney fee award shall be reduced by $19,737.50 and the expenses award shall be reduced by $2,694.75. The defendants' motion to amend and supplement findings of fact and conclusions of law or motion for new trial is in all other respects denied.

II. Plaintiffs' Motions to Strike the Defendants' Replies to Plaintiffs' Damage Calculations

The plaintiffs ask that the court strike the defendants' replies to the damage calculations because those replies were not filed on time. Because the defendants had contacted the court, however, and explained that their replies would be delayed, the motions to strike are denied.

III. Damage Calculations for Plaintiffs Who Were Paid by the Hour

The plaintiffs have filed damage calculations for plaintiffs who were paid by the hour. The defendants have responded to those calculations. The defendants agree that the following plaintiffs should be paid the following total amounts including liquidated damages:

Veralyn Blair	$26,714.40
Bettye Bryant	18,870.60
Joni Bushnell	9,178.96
Linda Brown	14,296,80
Christine Christiansen	9,759.12
Kenneth Crist	22,004.64
Anna Foster	5,863.76
Adrienne Geisenheimer	8,370.88
Michael Hamilton	7,323.68
Roger Hoyt	19,524.96
Sharon Jacoby	19,684.00
James Lewis	16,895.44
Rita Miller	7,707,84
Carol Renecker	34,535.70
Bonnie Stotts	14,027.44
Joyce Tompkins	25,361.68

The defendants contest the plaintiffs' damage calculations for Gladys Murray and Lois Phillips. According to the plaintiffs, Murray should receive $15,859.44 as an hourly employee in addition to the award she seeks as a salaried employee. The defendants reply that Gladys Murray should receive no compensation beyond that awarded as a manager. But the plaintiffs point out that Gladys Murray worked while she was on disability.

The court noted this in its memorandum opinion: " . . . Mrs. Murray testified that 'the regional manager for Stuckey's still called for me [while she was on disability]. I performed the daily reports. I ordered. I did the paperwork in the hospital. I complained [of the situation]. They [Stuckey's] told me to get the job done or they would get someone else.' " *Murray*, Memorandum of Law, p 6. In light of the court's findings of fact, the court deems it appropriate to award Mrs. Murray the requested $15,859.44 in hourly wages in addition to the amount she should receive for her managerial duties.

As for Lois Phillips, the defendants argue that she should receive $22,107.60, not the $48,079.60 set out in the plaintiffs' damage calculations. The plaintiffs argue that Mrs. Phillips should be paid for each of the hours she worked: the hours up to 40 each week as well as the overtime hours. The plaintiffs point to the testimony of Mrs. Phillips's husband, Donald, to support their argument that Mrs. Phillips worked off the clock and was paid for none of the hours she worked. The defendants assert that she should be paid for her overtime hours but not for the non-overtime hours up to 40 that she worked each week. The court is persuaded that Ms. Phillips should be

paid for all the hours that she worked, not just the overtime hours. She should receive $48,079.60.

IV. Damage Calculations for Plaintiffs Paid a Weekly Salary

The plaintiffs have filed damage calculations for 28 plaintiffs who were paid a salary. The defendants have contested those calculations. They claim that the plaintiffs erred in several ways: (1) the plaintiffs divided the bonuses paid by 2,000 hours instead of 3,000; (2) they included bonuses for four years instead of one; and (3) they included vacation pay in their calculations. The plaintiffs have conceded that they failed to deduct two weeks of vacation pay per year from their damage calculations and that the calculations should be reduced by 4% (approximately 2/52).

The court holds, as it did in its previous order addressing this issue, that 2,000 hours is the correct divisor for calculations of the bonus wage. *Murray, et al. v Stuckey's et al.*, p 2 (N D Iowa, January 8, 1990). The court therefore rejects the defendants' suggestion that bonuses should have been divided by 3,000 hours.

The plaintiffs also contend that damage calculations should be based on bonuses paid in 1982, 1983, 1984, and 1985. Nevertheless, in its findings of fact, this court acknowledged that bonuses had been paid in 1983. *Murray, et al. v Stuckey's et al.*, Memorandum of Law, p 10 (N D Iowa, July 17, 1989). The findings of fact do not mention bonuses paid for 1982, 1984, or 1985. The damage calculations should not be based on bonuses for those three years.

In determining the damages to be awarded the salaried employees, the court has accepted the defendants' calculations for the plaintiffs who received bonuses. The court also used the calculations which divided the bonus amounts by 2,000 hours instead of 3,000 hours. For the remaining salaried employees the court deducted 4% from the plaintiffs' calculations to account for the vacation pay which should not have been included in the calculations. On that basis, the following plaintiffs should be paid the following total amounts including liquidated damages:

Harley Blair	$27,062.62
Larry Brown	12,196.80
Kinney Bryant	21,345.41
Randy Bushnell	9,774.30
Floyd Caskey	7,229.38
Allan Christiansen	8,255.76
Bobbie Cockrell	8,711.37
Mary T. Cope	26,816.20
Sandra Crist	18,728.64
Stanley Dixon	37,358.82
Thomas Foster	4,774.56
Edward Geisenheimer	6,948.48
Rae Jean Hamilton	6,025.50
Deborah L. Hoyt	21,426.94
Loren Jacoby	18,429.90
Warren Kajander	8,459.46
Carol Lewis	16,675.96
Thomas Miller	8,932.56
Gladys Murray	32,283.16
Jeanette (Petrimoulx) Arbuckle	38,452.02
Donald Phillips	20,700.36
Joy M. Powers	35,796.08
Russell Renecker	53,048.00
Eugene Rutledge	47,339.00

Donald Scott	12,546.68
Arthur Stotts	16,291.20
Lawrence Taylor	24,601.94
David Tompkins	29,821.00

V. Defendants' Resisted Motion to Stay Execution for Seven Days

The defendants ask that the court stay execution of the judgment against them for seven days after the date of this order. The defendants assert that it will take approximately one week for them to secure an appropriate supersedeas bond if they decide to appeal this ruling, and they will be prejudiced if the plaintiffs are permitted to execute before the defendants can post the bond. In light of the court's request for additional briefing on the attorney fee issue, the court grants a stay of execution until seven days after the court enters an order on the attorney fee issue.

VI. Conclusion

Accordingly, IT IS ORDERED:

1. The fee award for the plaintiffs' attorneys shall be reduced by $19,737.50. Within 10 days of the date of this order, the plaintiffs' attorney shall file a brief on whether an enhancement of the attorney fee award for exceptional success would be appropriate. Within 10 days of the plaintiffs' attorney's filing, the defendants shall file a brief in response.

2. The award for expenses to the plaintiffs' attorneys shall be reduced by $2,694.75. The attorneys shall

receive $13,558.46 instead of the $16,253.21 originally awarded.

3. The defendants' motion to amend and supplement findings of fact and conclusions of law or motion for new trial is in all other respects denied.

4. The plaintiffs' motion to strike the defendants' replies to damage calculations is denied.

5. The plaintiffs shall receive the following amounts in damages including liquidated damages:

Harley Blair	$27,062.62
Veralyn Blair	26,714.40
Larry Brown	12,196.80
Linda Brown	14,296.80
Bettye Bryant	18,870.60
Kinney Bryant	21,345.41
Joni Bushnell	9,178.96
Randy Bushnell	9,774.30
Floyd Caskey	7,229.38
Allan Christiansen	8,255.76
Christine Christiansen	9,759.12
Bobbie Cockrell	8,711.37
Mary T. Cope	26,813.20
Kenneth Crist	22,004.64
Sandra Crist	18,728.64
Stanley Dixon	37,358.82
Anna Foster	5,863.76
Thomas Foster	4,774.56
Adrienne Geisenheimer	8,370.88
Edward Geisenheimer	6,948.48
Michael Hamilton	7,323.68
Rae Jean Hamilton	6,025.50
Deborah L. Hoyt	21,426.94
Roger Hoyt	19,524.96
Loren Jacoby	18,429.90

Sharon Jacoby	19,684.00
Warren Kajander	8,459.46
Carol Lewis	16,675.96
James Lewis	16,895.44
Rita Miller	7,707.84
Thomas Miller	8,932.56
Gladys Murray	48,142.60
Jeanette (Petrimoulx) Arbuckle	38,452.02
Donald Phillips	20,770.36
Lois Phillips	48,079.60
Joy M. Powers	35,796.08
Carol Renecker	34,535.70
Russell Renecker	53,048.00
Eugene Rutledge	47,339.00
Donald Scott	12,546.68
Arthur Stotts	16,291.20
Bonnie Stotts	14,027.44
Lawrence Taylor	24,601.94
David Tompkins	29,821.00
Joyce Tompkins	25,361.68

6. The defendants' motion for stay of execution is granted. Execution shall be stayed until seven days after the court enters an order on the attorney fee issue on which it has asked the parties to file briefs.

July 14, 1990.

/s/ Donald E. O'Brien
Donald E. O'Brien, Chief Judge
UNITED STATES DISTRICT COURT

Copies mailed by regular mail July 16, 1990 to:

PL Nymann; Steven Kohl; PO Box 1825; Sioux City, IA 51102

Gene LaSuer; Jean MNeil [sic]; 2300 Financial Center; Des Moines, IA 50309

John Renick; 2730 North Ballas Road; Suite 200; St. Louis, MO 63131

/s/ J Hoch
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SIDNEY MURRAY and GLADYS MURRAY, On Behalf of Themselves and All Others Similarly Situated,	*	Civil No. 85-4085
Plaintiffs,	*	Order
vs.	*	(Filed Oct. 31, 1990)
STUCKEY'S INC. and PET INCORPORATED,	*	
Defendants.	*	

In its order on posttrial motions in this case, this court noted:

> Until the parties submitted the damage calculations in this case, the court had not been fully alerted to the extent of the plaintiffs' success and recovery. In light of the nearly $950,000 award of damages set out in this order, the court deems it appropriate to revisit one aspect of the attorney fee claim – the possibility of a fee enhancement due to the plaintiffs' exceptional success in this case. See, for example, *Richardson v Restaurant Marketing Associates, Inc.*, 527 F Supp 690, 702 (ND Cal 1981). The court is considering an enhancement of $50,000 in the attorney fee award. Though the parties have made several filings on the attorney fees issue, none appears to directly address this issue of the possibility of a fee enhancement for exceptional

> success. The court therefore requests that the parties file their views on this matter . . .

Murray v Stuckey's, 85-4085, slip op at 4 (ND Iowa, July 16, 1990). The parties have filed briefs on the issue of a possible enhancement. After considering the arguments, the court determines that a further enhancement of the fee award would be inappropriate. The court concludes, however, that its order of January 5 must be modified to permit the plaintiffs' attorneys to recover part of the fee due under the contingent fee agreement with their clients.

In *Blum v Stenson*, 465 US 886, 891 (1984) the district court had awarded the attorney for the plaintiff class a 50% enhancement in fees due to "the quality of representation, the complexity of the issues, the riskiness of success, and the 'great benefit to a large class' that was achieved." The Supreme Court, however, reversed the award of an enhanced fee. The court noted that "because acknowledgement of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Id.* at 900.

In *Pennsylvania v Delaware Valley Citizens' Council for Clean Air*, 478 US 546, 565 (1986), the Supreme Court reaffirmed the view it had expressed in *Stenson:* complexity of issues, skill of counsel, quality of representation, and results obtained generally cannot serve as independent bases for increasing the basic fee award. Moreover,

> [a]lthough upward adjustments of the lodestar figure are still permissible, [citation omitted], such modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both

> 'sp cific evidence' on the record and detailed fin ings by the lower courts. . . . In short, the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

Id., at 565, 566. See also *McGee v Hester*, 815 F2d 1193, 1198 (8th Cir 1987) (record did not reflect exceptional success meriting enhanced attorney fee award); *Easley v Anheuser-Busch, Inc.*, 758 F2d 251, 264 (8th Cir 1985) (factors including results obtained on behalf of plaintiffs in employment discrimination case not sufficient to warrant enhancement of fee).

This court granted the plaintiffs' attorneys a 15% upward adjustment in the fee award because of the plaintiff's contingency risk of not prevailing and because of a delay in payment factor due to the lengthy nature of this litigation. *Murray v Stuckey's*, 85-4085, slip op at 8 (ND Iowa, January 5, 1990). This court had preliminarily considered the holding in *Richardson v Restaurant Marketing Associates, Inc.*, 527 F Supp 690, 702 (ND Cal 1981), a potential basis for an enhancement of the fee award here. But in light of the authority cited to the court by the parties – *Stenson* and *Delaware Valley* – as well as *McGee* and *Easley*, this court cannot conclude that this case is of the "rare" or "exceptional" sort warranting a further enhancement of the attorney fee award because of the results obtained.

Nevertheless, the court deems it appropriate to modify its order regarding the enforceability of the plaintiffs'

attorneys contingent fee agreement with their clients. In its order of January 5, this court said:

> The fee award in this case takes the place of the one-third portion that plaintiff's counsel were to receive under their contingency agreement: plaintiffs' counsel can now recover nothing from their clients under that agreement.

Murray v. Stuckey's, 85-4085, slip op at 5 (ND Iowa, January 5, 1990). The court was concerned that plaintiffs' attorneys might receive a double recovery if they were awarded statutory attorney fees and allowed to recover on the contingent fee contract. The plaintiffs, however, have now alerted the court to the Eighth Circuit Court of Appeals's decision in *Wilmington v J.I. Case Co.*, 793 F2d 909, 923 (8th Cir 1986). In *Wilmington*, the court held that the award of fees need not "circumscribe the amount attorneys may recover by limiting compensation to the statutory award regardless of other arrangements with the client. [Citations omitted]. . . . We also are inclined to agree . . . that normally the plaintiff should be responsible for the difference between the statutory award and the contingent fee amount." *Id.* This court therefore deems it appropriate to modify its earlier order on attorney fees to comply with the court of appeals's example in *Wilmington:* the plaintiffs' attorneys shall be permitted to recover fees from their clients under the contingent fee agreement, but the statutory fee award shall be applied toward the amount due the plaintiffs' attorneys under the contingent fee agreement, not in addition to the amount due under that agreement.

Accordingly, IT IS ORDERED, the court's January 5 order on attorney fees shall be modified as follows:

1. The first full sentence on page five shall be deleted.

2. The following sentences shall replace it: "The plaintiffs' attorneys shall be permitted to recover fees from their clients under the contingent fee agreement, but the statutory fee award shall be applied toward the amount due the plaintiffs' attorneys under the contingent fee agreement, not in addition to the amount due under that agreement. See *Wilmington v. J.I. Case Co.*, 793 F2d 909, 923 (8th Cir 1986)."

3. The statutory fee award to the plaintiffs' attorneys shall be $106,317.50.

October 31, 1990.

/s/ Donald E. O'Brien
Donald E. O'Brien,
Chief Judge
United States
District Court

Copies mailed by regular mail October 31, 1990 to:

P.L. Nymann; Steven Kohl; PO Box 1825; Sioux City, IA 51101

Gene LaSuer; Jean MNeil [sic]; 2300 Financial Center; Des Moines, IA 50309

John Renick; 2730 North Ballas Road; Suite 200; St Louis, MO 63131

Two (2) Certified copies to 8th Circuit in St Louis, MO

/s/ J. Hoch
Deputy Clerk

APPENDIX G

Federal Rule of Civil Procedure 52a

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the

evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

APPENDIX H

Section 16 FLSA

[Wage Suits by Employees]

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under

section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefore under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

APPENDIX I

Section 13 FLSA

Sec. 13. (a) The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to–

[Executive, Administrative, Professional Employees, and Outside Salesmen]

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

* * *

No. 91-903

FILED
JAN 2 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GLADYS MURRAY, On Behalf Of Herself And All Others Similarly Situated (and 27 Other Individuals),

Petitioners,

VS.

STUCKEY'S INC. and PET INCORPORATED,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GENE R. LASUER
DAVIS, HOCKENBERG, WINE, BROWN, KOEHN & SHORS
2300 Financial Center
Des Moines, Iowa 50309
(515) 243-2300

Counsel of Record

JOHN B. RENICK
MCMAHON, BERGER, HANNA, LINIHAN, CODY & MCCARTHY
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350

Attorneys for Respondents

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals appropriately determined that the District Court erred in applying the law defining the executive exemption under the Fair Labor Standards Act to the facts of this case?

2. Whether it is appropriate for this Court to grant review of a decision which is not contrary to prior decisions of this Court, the Eighth Circuit or the other Circuits and which simply holds that the District Court misapplied the law to the facts of this case?

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Contents	iii
Table of Authorities	iv
Statement of the Case	1
Summary of Argument	3
Argument	5
I. An Employee's Exempt Or Nonexempt Status Under The FLSA Is A Question Of Law	5
II. The Eighth Circuit Did Not Engage In Fact-Finding Or Substitute Its Judgment For That Of The District Court On The Facts	7
A. The District Court's Findings	7
B. Petitioner's Reliance On This Court's Decision In *Icicle Seafoods* Is Misplaced	11
III. Findings Of Fact Induced By An Erroneous View Of Controlling Legal Principles Are Not Binding	11
IV. The District Court's Rulings Were Clearly Erroneous	14
V. None Of The Considerations For Review On Writ Of Certiorari Are Present In This Case	15
Conclusion	18

TABLE OF AUTHORITIES

Page(s)

Cases:

Anderson v. Bessemer City, N.C., 470 U.S. 562 (1985) 15

Bose v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) 12

Brock v. Norman's country Market, Inc., 835 F.2d 823 (11th Cir.), *cert. denied*, 108 S. Ct. 2845 (1988) 18

Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982) 8

Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107 (7th Cir. 1975) 13

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986) 3,5,6,7,11,17

Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980), *vacated* 451 U.S. 902 (1981), *opinion on remand*, 657 F.2d 750 (5th Cir. 1981) 12

Stafos v. Jarvis, 477 F.2d 369 (10th Cir.), *cert. denied*, 414 U.S. 944 (1973) 13

United State v. United States Gypsum Co., 335 U.S. 364 (1948) 12,13

Walling v. General Industries Co., 330 U.S. 545 (1947) 5

Statutes, Regulations and Rule:

Fair Labor Standards Act of 1938, as amended (29 U.S.C. §§ 201, *et seq.*) 2

29 U.S.C. § 213(a)(1) 2,5

29 U.S.C. § 213(b)(6) 6

29 C.F.R. § 541.1 2,5,7,10,18

29 C.F.R. § 541.102 12,13

29 C.F.R. § 541.103 8,12,13,14

29 C.F.R. § 541.113 10,12

Rule 52, Federal Rules of Civil Procedure 3,6,12,15,16

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GLADYS MURRAY, On Behalf Of Herself And All Others Similarly Situated (and 27 Other Individuals),

Petitioners,

vs.

STUCKEY'S INC. and PET INCORPORATED,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Petitioners are former managers of retail convenience stores owned and operated by Stuckey's, Inc. At all times pertinent to Petitioners' claims, Stuckey's, Inc. was a wholly owned subsidiary of Pet, Incorporated. During the course of this litigation, Pet was a subsidiary of IC Industries which was later renamed Whitman Corporation. Currently, Pet is not affiliated with any other corporation.

The managers filed suit claiming they worked twenty-four (24) hours a day throughout their periods of employment. They

sought unpaid overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §§ 201, *et seq.*). Stuckey's and Pet, hereinafter referred to as Respondents, claimed that the managers were exempt from the recordkeeping, minimum wage, and overtime pay requirements of the FLSA, pursuant to § 213(a)(1), because they were executive employees as defined by the regulations of the Secretary of Labor. Under the regulations, employees must meet the requirements of a six part test to qualify as exempt executives. 29 C.F.R. § 541.1.

Following trial in the United States District Court for the Northern District of Iowa, judgment was entered for the managers and back wages and liquidated damages were awarded to each, although not on the basis of twenty-four (24) hours worked per day. A subsequent Order was entered awarding attorneys' fees. Respondents appealed to the United States Court of Appeals for the Eighth Circuit. Following oral argument, a three judge panel unanimously reversed the District Court's decision on the back wages and damage awards to the managers and vacated the award of attorneys' fees. However, the panel did not make a complete determination on the exemption claims because the District Court had not made complete findings of fact and conclusions of law on all elements of the executive exemption test. The cause was remanded to the District Court for further consideration of remaining issues necessary to final adjudication of the managers' exempt or nonexempt status.

A Petition for Rehearing and Suggestion for Rehearing En Banc filed on behalf of the managers were subsequently denied by Order of the Eighth Circuit dated September 19, 1991. Respondents' counsel on appeal received copies of the Petition for Writ of Certiorari on December 3 and 4, 1991, respectively.

SUMMARY OF ARGUMENT

Respondents submit no legitimate reasons are presented by the Petition for reviewing certain rulings made by the Eighth Circuit Court of Appeals in this cause. Petitioners' contentions that the Eighth Circuit's decision conflicts with applicable decisions of this Court and that it conflicts with recent decisions of three other Circuit Courts of Appeals are without merit. These contentions, which are procedural in nature rather than substantive, stem from Petitioners' inability to recognize and differentiate questions of fact and questions of law and from their misinterpretation of the Eighth Circuit's rulings. Contrary to Petitioners' suggestions, the Eighth Circuit panel did not make factual findings on their own nor did they substitute their judgment of the facts for that of the District Court, without regard to the Rule 52(a) "clearly erroneous" standard of review.

Instead, the panel held that the District Court erred in applying the law, in the form of the Secretary's regulations and interpretations, to the undisputed facts of record. As a result, the Eighth Circuit reached different conclusions in determining whether Respondents' proof was sufficient to establish that store managers met two of the elements of the executive exemption test. To the extent that the District Court's "findings of fact" were predicated on its erroneous interpretations of the applicable law, the "clearly erroneous" standard was not controlling. Nonetheless, it is plainly evident from the opinion that the panel adjudged the District Court's rulings on these issues to be clear error. In so holding, it is equally evident that the Eighth Circuit was mindful of longstanding precedent under the FLSA that exemptions are to be narrowly construed and the employer is held to a strict burden of proof.

Furthermore, it is apparent that the methodology utilized by the panel in reaching its conclusions was fully consistent with the holdings of *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709

(1986). The fallacy of Petitioners' contrary argument can be readily seen by contrasting the Eighth Circuit opinion in this cause with that of the Ninth Circuit in *Icicle Seafoods* which this Court vacated. Whereas the Ninth Circuit engaged in an independent, *de novo* review of the facts in the trial court, the Eighth Circuit panel specifically focused on and analyzed each of the District Court's factual bases for its findings and conclusions. They then proceeded to analyze the applicable law and held that District Court had erred because, as a matter of law, the store managers clearly fit within the legal definitions for two elements of the executive exemption test. Therefore, the District Court's contrary holdings were reversed.

Petitioners and their counsel obviously disagree with the result. However, they have failed to show that the Eighth Circuit has interpreted substantive or procedural law in such a way that a conflict among the Circuits or with controlling decisions of this Court exists. No other special or important reasons for granting the Petition exist, particularly when the exemption claims have yet to be finally ruled by the lower courts. Review of the Eighth Circuit decisions is, therefore, unwarranted.

ARGUMENT

I. AN EMPLOYEE'S EXEMPT OR NON-EXEMPT STATUS UNDER THE FLSA IS A QUESTION OF LAW

The Eighth Circuit decision addressed five of the elements of the regulation which defines an executive employee for purposes of exemption from the minimum wage and overtime requirements of the FLSA. *See* 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.1(a)-(e). It is undisputed that a claim of exemption under § 213(a)(1) must be pleaded and proved by a defendant employer as an affirmative defense. Neither is it disputed that exemptions from the FLSA requirements have traditionally been narrowly construed. Nothing in the Court's decisions contravenes these principles of law. What the Court held is that the District Court erred as a matter of law in ruling that Respondents did not meet their burden of proof on two of the elements for the executive exemption claimed for Stuckey's store managers. Rather than engage in fact finding, the Court remanded the case to the District Court to consider the evidence pertinent to the three elements which it had failed to address and rule on the exemption.

In seeking review of the Eighth Circuit's rulings, Petitioners are obviously confused about the distinctions between questions of fact and questions of law. This is best exemplified by their repeated claim that whether or not Respondents sustained their burden of proof to show that managers were exempt executive employees is a question of fact. *See* Petition, pp. 8, 10 and 15. Such a claim reveals the fundamental misunderstanding upon which the Petition is based. The determination of exempt or nonexempt status in this kind of case is the ultimate *legal* issue. That is clear from this Court's decision in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), referencing an earlier decision in *Walling v. General Industries Co.*, 330 U.S. 545 (1947):

> "We therefore reaffirm our holding in *Walling* that the facts necessary to a *proper determination of the legal question whether an exemption to the FLSA applies in a particular case* should be reviewed by the Court of Appeals pursuant to Rule 52(a), like the facts in other civil bench - tried litigation in federal courts." 475 U.S. at 713 (emphasis added)

It could not be more clear. Yet Petitioners are unable or unwilling to accept that only the facts necessary to determination of legal questions are subject to review under the Rule 52(a) standard.

The exemption at issue in the *Icicle Seafoods* case excluded "any employee employed as a seaman" from the overtime requirements of the FLSA. 29 U.S.C. § 213(b)(6). This Court noted that the underlying question of how the plaintiffs spent their working time was a question of fact. However,

> "[T]he *question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law* which both parties concede is governed by the pertinent regulations promulgated by the Wage and Hour Administrator." 475 U.S. at 714. (emphasis added)

In the case at bar, what the duties and responsibilities of the store managers were and how they spent their working time are clearly questions of fact. It is equally clear that the determination of whether or not their activities and responsibilities were sufficient to qualify them for the executive exemption, as defined by the regulations, involves questions of law.

II. THE EIGHTH CIRCUIT DID NOT ENGAGE IN FACT-FINDING OR SUBSTITUTE ITS JUDGMENT FOR THAT OF THE DISTRICT COURT ON THE FACTS

In the first of their Questions Presented for Review, the Petitioners claim that the Eighth Circuit improperly engaged in fact finding contrary to the teachings of this Court's holding in *Icicle Seafoods, supra.* No specific example or instance is cited to support the claim. It can only stem from Petitioners' erroneous interpretation of the Eighth Circuit's ruling, as does the claim that the panel substituted their judgment of the facts in reversing the District Court.

The record shows that of the work related elements of the executive exemption, the District Court made specific findings of fact on only one, § 541.1(a), commonly referred to as the primary duty test. It provides that to be employed in a bona fide executive capacity within the meaning of the FLSA, an employee's primary duty must consist of the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof. The District Court held, both in its Findings of Fact and in its Conclusions of Law, that Respondents failed to prove that store managers had management as their primary duty. (Appendix C, pp. 36a-37a, 54a). On appeal, the Eighth Circuit methodically analyzed and reviewed the factual bases and rationale for the District Court's determination that the primary duty test was not met. In concluding that the District Court erred in construing the primary duty requirement, the panel did not engage in independent fact finding. Rather, the Court appropriately determined that the law had been misapplied on the undisputed facts of record.

A. The District Court's Findings.

The Eighth Circuit discerned that the District Court essentially relied on three factors to reach the conclusion that Respon-

dent failed to prove that store managers had management as their primary duty. It is immediately obvious from the analysis of the first factual basis for the District Court's ruling that the panel was fully cognizant of the "clearly erroneous" standard for setting aside findings of fact. The Court explicitly holds the finding by the District Court that managers spent 65-90 percent on nonexempt duties, "though imprecise and unexplained, is relevant *and not clearly erroneous*." (Appendix, p. 9a).[1] It is, therefore, evident that the Eighth Circuit did not simply ignore the standard of review applicable to findings of fact in a nonjury case as Petitioners would have this Court believe.

With respect to this percentage finding, the Eighth Circuit neither set it aside nor substituted its judgment as to a more appropriate percentage. This finding remained undisturbed. However, as the panel noted, the Secretary's interpretation of the term "primary duty" in § 541.103 and the First Circuit's 1982 decision in *Donovan v. Burger King Corp.*, 672 F.2d 221, 227 (1st Cir. 1982), support the legal proposition that a manager can spend more than 50 percent of his/her time on nonmanagerial work and still have management as his/her primary duty.[2]

Secondly, the District Court found that there was little difference in the duties of the store manager and their spouses who

---

[1] Arguably, by failing to articulate the particular duties to which this percentage of time was devoted and simply describing them as not management-related and, therefore, non-exempt duties, this "finding" is in truth a conclusion of law. However, this was not of concern to the Eighth Circuit because percentages of time devoted to any particular kinds of tasks are not dispositive of an individual's primary duty, as a matter of law.

[2] Nothing was presented on appeal or in the Petition to suggest that the First Circuit improperly analyzed the primary duty test. In fact, the Petition makes no mention of, and cannot be considered to dispute, the Eighth Circuit's endorsement of the *Burger King* rationale quoted in the opinion. (Appendix, pp. 9a-10a).

worked as hourly employees. This finding was not set aside but the panel found it to be irrelevant to the determination of the managers' primary duty. Instead they pointed to the District Court's finding of fact that Respondent designated only one person at each store to be the manager and held, as a matter of law, that Respondents were entitled to have one designated exempt executive at each of their remotely located facilities. Whether or not other employees could or did perform management duties did not detract from the primary duty of the designated manager in charge of the store. Thus, whether or not the District Court's finding on the similarity of the manager and spouse's duties is clearly erroneous is of no consequence to the determination of the primary duty test. The Eighth Circuit held it was error to rely on this finding for the conclusion that Respondent failed to prove management was the primary duty of the designated store managers.

Finally, the District Court found that the store managers simply took orders and had little, if any, real involvement as managers. (Appendix, p. 37a). It then stated in its Conclusions of Law that Respondent's regional managers served as the "real managers" of the stores in the geographic areas for which they were responsible. (Appendix, p. 52a). However, the District Court also specifically noted in its Conclusions of Law that each of the managers who appeared in person at trial testified that they:

1. hired and fired employees;
2. trained, supervised and disciplined employees;
3. maintained inventory;
4. produced daily, weekly, and monthly financial reports; and
5. supervised other aspects of store operations.

(Appendix, p. 49a). Again in its Conclusions of Law, the District Court noted that store managers reported to regional managers who did not live at the stores but who made occasional visits and kept in contact with store managers by telephone on a weekly basis. (Appendix, p. 49a). Furthermore, in its Findings of Fact, the District Court found that each store was an independent location and, by necessity, was geographically separated from other company property. (Appendix, p. 26a).

The Eighth Circuit neither set aside the District Court's findings of fact nor made contrary or additional findings of its own. Rather, it rejected the District Court's self described *conclusion of law* that regional managers were the real managers of the stores. The result is that in the Eighth Circuit's view, the District Court misinterpreted the requirements of the primary duty test, thereby wrongly applying the law to the facts. The panel concluded that on the facts of record, Respondents had indeed carried their burden to show that store managers had management as their primary duty within the meaning of the Wage and Hour regulations. The District Court's holding was, therefore, reversed.

The same is true with respect to the "sole charge" exception to the limitations in § 541.1(e) on the amount of time which can be devoted to nonmanagement activities by an executive employee. The District Court held the exception was not applicable to the store managers. Its only explanation was that it relied on the same reasoning as set forth in its analysis of the primary duty question. (Appendix, p. 54a). The Eighth Circuit, based on the same facts of record, found it *clear* that the managers did meet the requirements for the sole charge exception. Accordingly, the panel ruled that the District Court erred in applying the law, in the form of § 541.113, to the facts of the store managers' employment.

B. Petitioners' Reliance On This Court's Decision In *Icicle Seafoods* Is Misplaced.

Petitioners suggest that the Eighth Circuit has somehow violated principles of law set forth in *Icicle Seafoods, supra*, in reversing the District Court. However, upon closer review of that decision it becomes apparent that this court was addressing an entirely different basis of error. The Ninth Circuit wrongly applied a *de novo* standard of review to the *factual* issues underlying the trial court's conclusion that employees were exempt seamen. *Nowhere in the Ninth Circuit opinion did that court ever mention any of the factual findings of the trial court, must less discuss them or analyze them.* This Court faulted the Ninth Circuit for conducting an independent review of the record and making contrary findings of fact on its own in order to reach a contrary conclusion on the exemption question.

The Eighth Circuit in the case at bar did not conduct a *de novo* review of the facts. Instead it did precisely what the Ninth Circuit failed to do in *Icicle Seafoods*. The panel started with the factors relied upon by the District Court for its findings and conclusions that Respondent had not sustained its burden of proof on the primary duty test and the sole charge exception. Each factor was then reviewed and analyzed individually. The Court then reversed the District Court's determination on these two issues because it held that proper rules of law were not applied to the factual findings. This approach was and is entirely consistent with the teachings of *Icicle Seafoods*.

III. FINDINGS OF FACT INDUCED BY AN ERRONEOUS VIEW OF CONTROLLING LEGAL PRINCIPLES ARE NOT BINDING

Petitioners insist that the question of a store manager's primary duty is a question of fact. Respondents readily concede that questions of fact are involved in determining the particular

activities and duties of store managers, i.e., how they spent their working time. But the teaching of *Icicle Seafoods* is that resolution of an exemption claims involves questions of both fact and law. Where questions of fact are predicated on an erroneous view of the law, Rule 52(a) does not prescribe the standard of review. *United States v. United States Gypsum Co.*, 335 U.S. 364, 394 (1948). The Eighth Circuit opinion is premised on the determinations that the District Court had misconstrued and misinterpreted the law, specifically in the form of § 541.102-103 and § 541.113, and misapplied it to the facts to reach the conclusion that store managers did not have management as their primary duty.

If it is assumed the District Court's holding that store managers did not satisfy the primary duty test is a finding of fact, it is apparent this finding resulted from erroneous application of controlling legal principles. As such, it was not binding on the appellate court. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980), *vacated* 451 U.S. 902 (1981), *opinion on remand*, 657 F.2d 750 (5th Cir. 1981). This Court held in *Bose v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984):

> "[B]ut Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of fact that is predicated on a misunderstanding of the governing rule of law."

In this case, the Eighth Circuit did not substitute its judgment of the underlying facts relevant to the duties, responsibilities and role of the store managers and the actual work they performed, for that of the District Court. It did substitute its interpretation of the legal requirements for two elements of the executive exemption, for that of the District Court. In so doing, the Eighth Circuit acted in accordance with the accepted course of judicial proceedings for an appellate court. Respondents were and are

entitled to a reversal of the District Court's erroneous interpretations of the law governing the executive exemption. Respondents were rightfully held to a higher standard of proof in claiming an exemption from the FLSA but Petitioners' suggestion that equal treatment in the appellate process should not be afforded them just because of their employer status is entirely unfounded.

In further support of their claim that "the question of exemption was a question of fact", Petitioners contend the regulations with respect to primary duty "so state", referring to 29 C.F.R. § 541.103. (Appendix, pp. 10-11). Interestingly, the Eighth Circuit specifically relied on § 541.103 in holding that the District Court erred as a matter of law in not finding that Respondent proved that management was the primary duty of its store managers. (Appendix, p. 9a). The very first sentence of § 541.103 states:

> "[A] *determination* of whether an employee has management as his primary duty must be based on all the facts in a particular case." (emphasis added).

Work which is considered to be management or "exempt" work is defined by the Secretary of Labor, as noted by the Eighth Circuit, in § 541.102. (Appendix, p. 11a). Therefore, the "determination" referred to by the Secretary in § 541.103 can only be made by comparing the facts of a manager's employment with the legal definitions of the terms "management" and "primary duty".

Again, it it is assumed that the "determination" of whether an employee has management as his primary duty is a question of fact rather than of law, it must be recognized that such an ultimate finding *incorporates* both fact and law. Where such a finding incorporates error as to the law, it is not subject to the clearly erroneous standard of review. *United States v. United States Gypsum Co., supra; Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107 (7th Cir. 9175), *Stafos v. Jarvis*, 477 F.2d 369

(10th Cir.), *cert. denied*, 414 U.S. 944 (1973). A determination that a manager is in sole charge of a physically separated branch establishment is no different. It requires the comparison of the facts of the manager's employment with the legal definitions of the terms "sole charge" and "physically separated branch establishment". Thus, at the very least, the Eighth circuit was within its authority to set aside ultimate findings of fact even though underlying findings of fact were not clearly erroneous. Such ultimate findings were defective because the District Court incorporated and applied erroneous interpretations of the law governing the exemption.

IV. THE DISTRICT COURT'S RULINGS WERE CLEARLY ERRONEOUS

In any event, if the Eighth Circuit's reversal of the District Court's rulings is perceived as setting aside findings of fact rather than correcting errors of law, it is plainly evident from the opinion that the panel found the rulings on the primary duty test and sole charge exception to be clearly erroneous. For instance, after reviewing the requirements for a determination that a manager is in sole charge of a branch establishment, as defined in the regulations, the Court noted that:

> "the sole charge exception seems to be written for employees like these store managers. . . . It is clear that Stuckey's store managers satisfy these sole charge standards." (Appendix, p. 15a).

Under these circumstances, the District Court's contrary findings and/or conclusions had to be clear error.

Because the managers were in sole charge of their stores, based on the definition given in § 541.103 and cited in the Eighth Circuit opinion, they had to have management as their primary duty. The panel held:

> "[I]n this case, it is undisputed that the plaintiff store managers were the on-site employees ultimately responsible for the stores operations, even though their discretion was circumscribed. Thus, their responsibilities placed them *squarely* within the dictates of the above regulation, as construed by *Burger King* and other decisions dealing with comparable multi-store operations." (Appendix, p. 13a). (emphasis added).

Based on this holding, the District Court's contrary findings and/or conclusions had to be clear error.

The Eighth Circuit did not construe its holdings as setting aside findings of fact but even if the decision is scrutinized under the Rule 52(a) standard, there is no doubt that the standard was met. The decisions convey that the Court was "left with the definite and firm conviction" that mistakes had been committed. *Anderson v. Bessemer City, N.C.*, 470 U.S. 562 (1985). Whether they are categorized as mistakes of fact or mistakes of law, the outcome would be the same. The District Court clearly erred in findings and concluding that Respondents did not meet their burden of proof to show that managers were in sole charge of their stores and had management as their primary duty.

V. NONE OF THE CONSIDERATIONS FOR REVIEW ON WRIT OF CERTIORARI ARE PRESENT IN THIS CASE

The Eighth Circuit has correctly ruled in this case that Respondents proved, as a matter of fact and of law, Stuckey's store managers met two of the elements necessary for exemption from FLSA wage and overtime requires as executive employees. The Court correctly deferred ruling on elements of the exemption requirements which were not addressed by the District Court and has remanded the case for the entry of further findings of fact and conclusions of law.

Insofar as the merits of the Eighth Circuit decision are concerned, Petitioners have pointed to no appellate cases which conflict with the Court's interpretations of the primary duty test or the sole charge exception. Petitioners cannot and do not argue that the Eighth Circuit has erroneously interpreted or applied the law. They simply argue that the Court should not have reversed the District Court's "findings of fact". It is apparent the Eighth Circuit based its reversal on perceived errors of law. However, because it found the District Court holdings to be clear error, the result would be no different whether or not the Rule 52(a) standard of review was applied. For that reason, there is absolutely nothing about this case that requires the attention of this Court.

Petitioners advance the argument as the last of their Questions Presented for Review that the Eighth Circuit has departed from the accepted and usual course of judicial proceedings. Respondents submit that such an argument borders on being frivolous. The sole basis for it is the representation that Petitioners have found no other Courts of Appeals decisions which overturned findings in favor of employees on the primary duty test or the executive exemption. Apparently, they did not bother to read the First Circuit's *Burger King* decision cited and relied upon as legal precedent in the Eighth Circuit's opinion. However, Petitioners' or their counsel's lack of diligence aside, whether any similar cases exist is totally irrelevant. FLSA exemption cases are peculiar because they are always dependent on individual fact situations. Petitioners' argument amounts to nothing more than saying that an award to employees should never be reversed. Such a proposition is patently absurd.

No reasonable interpretation of the Eighth Circuit opinion in this case could lead to the conclusion that the panel "dramatically departed from the accepted and usual course of judicial proceedings" or that this case "cries out for the exercise of this Court's power of supervision" (Petition, p. 15). The action of the panel

fully comports with the principles of law enunciated in *Icicle Seafoods, supra.*

CONCLUSION

Petitioner has not shown the existence of any significant issue of substantive or procedural law, let alone special or important reasons, which call for review or supervision by this Court on writ of certiorari. The Eighth Circuit's rulings are not in conflict with the decisions of this Court cited by Petitioners nor are they in conflict with other circuits which have interpreted the burden of proof in FLSA exemption cases. The Eighth Circuit has corrected what otherwise would have been a grievous error, based on its determination that store managers clearly and unmistakenly met the terms and spirit of the primary duty test and sole charge exception under § 541.1(a) and (e). *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir.), *cert. denied*, 108 S. Ct. 2845 (1988). The case should be returned to the District Court for further proceedings in accordance with the opinion.

Accordingly, the Petition should be denied.

Respectfully submitted,

GENE R. LaSUER
Davis, Hockenberg, Wine,
Brown, Koehn & Shors
2300 Financial Center
Des Moines, Iowa 50309
(515) 243-2300

Counsel of Record

JOHN B. RENICK
McMahon, Berger, Hanna,
Linihan, Cody & McCarthy
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039

Attorneys for Respondents

(3)

No. 91-903

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In The

Supreme Court of the United States

October Term, 1991

GLADYS MURRAY, On Behalf of Herself
And All Others Similarly Situated
(and 27 Other Individuals),

Petitioners,

v.

STUCKEY'S, INC. and
PET INCORPORATED,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

P. L. NYMANN
Counsel of Record
for Petitioners
383-390 Orpheum Electric Bldg.
P.O. Box 1825
Sioux City, Iowa 51102
Phone: (712) 258-0101

STEVEN C. KOHL
Co-Counsel for Petitioners
383-390 Orpheum Electric Bldg.
P.O. Box 1825
Sioux City, Iowa 51102
Phone: (712) 258-0101

P. L. NYMANN
and
STEVEN C. KOHL
On the Reply Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I Respondents concede that the three judge panel substituted its judgment of the facts for that of the trial court 1

II None of the Findings of Fact of the trial court were clearly erroneous nor were they found by the panel to be clearly erroneous 3

III The statement of the panel "that Respondents were entitled to have one designated exempt executive at each . . . facility" is legally erroneous and cannot be used as support for substituting the judgment of the three judge panel for that of the trial court 4

IV Respondents' Brief misconceives the action of the three judge panel 5

V Respondents' Brief misconceives, mischaracterizes, ignores, or misconstrues the Petition for Writ of Certiorari 6

Conclusion 10

TABLE OF AUTHORITIES CITED

Page

CASES

Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) 6

Donovan v. Burger King Corporation, 672 F.2d 221 (1st Cir. 1982) 9

Donovan v. Waffle House, Inc., 26 Wage and Hour Cases (BNA) 868 (N.D. Ga. 1983) 7

RULES

29 C.F.R. § 541.1 5

29 C.F.R. § 541.113 7

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REPLY BRIEF FOR PETITIONERS

I

Respondents concede that the three judge panel substituted its judgment of the facts for that of the trial court.

In their Brief (p. 6) Respondents concede that " . . . what the *duties and responsibilities* of the store managers were and how they spent their working time are clearly questions of fact." (emphasis supplied) Petitioners agree. On these subjects the District Court made findings of fact that:

"The *duties* of the 'manager' and 'hourly employee' were essentially the same" (Finding of Fact 17) (App. p. 27a). (emphasis supplied)

and

. . . the defendants have failed to sustain their burden of proof that such employees are exempt from the overtime provisions of the Fair Labor Standards Act (Finding of Fact 29) (App. p. 37a).

and

"With respect to Plaintiffs who received a weekly salary (managers), the defendants have failed to sustain their burden of proof that the primary *duty* of those employees was management . . . In essence, the evidence demonstrated that the 'managers' simply took orders and had little, if any, real involvement as managers" (Finding of Fact 28) (App. p. 36a). (emphasis supplied)

and

" . . . the court is persuaded that the 'managers' did not have management as a primary *duty*." (Finding of Fact 28) (App. p. 37a). (emphasis supplied)

Unless *all four* of those findings of fact are set aside as being clearly erroneous there can be no justification for the reversal by the three judge panel of the Eighth Circuit. Any *one* of those findings of fact absolutely precludes any ultimate finding that the so-called "managers" are exempt. The panel has clearly substituted its judgment of the facts for the judgment of the trial court.

II

None of the Findings of Fact of the trial court were clearly erroneous nor were they found by the panel to be clearly erroneous.

The four findings of fact (unless set aside as being clearly erroneous) that preclude any conclusion by the panel that the Respondents have carried their burden of proof as to the executive exemption are set forth at pages 6 and 7 of the Petition and again at page 2 of this Reply and need not be repeated again.

At pages 14 and 15 of their Brief Respondents contend "THE DISTRICT COURT'S RULINGS WERE CLEARLY ERRONEOUS". But they do not tell this Court, or Petitioners, which of the four crucial findings of fact listed in the Petition, and again in this Reply, are clearly erroneous or why any one of them might be clearly erroneous, let alone why all of them might be clearly erroneous.

As noted in Division I of this Reply, if *any one* of those findings of fact remain, it is clear that the executive exemption has not been proven by Defendants. Under any of the three tests for executive exemption, (i.e. the short test, the long test, or the sole charge exemption) the primary duty of the employer must be management. The trial court has made findings of fact that management was not the primary duty. (Finding of Fact 28) (App. p. 37a)

Those findings of fact are clearly and adequately supported by substantial evidence in the case. For example, each of the Plaintiffs who testified live, testified that their primary duty was *not* management of the store (See, e.g. Tr. Vol. 1, pp. 38-39 (Gladys Murray), p. 98 (Arbuckle), p. 203 (R. Renecker)). Additionally, a former

Regional Manager testified that there was not any real difference in the duties between the "managers" and the "manager's" spouse, who was an hourly employee (Roush dep. pp. 18-19). The Finding of Fact is further supported by substantial evidence that the so-called "managers" spent 75%, 80%, and up to 90% of their time performing non-exempt duties.

At best, from the perspective of Defendants, there was a conflict in the testimony presented by Plaintiffs and Defendants as to the "primary duties" of Plaintiffs (Petitioners herein). The trial court resolved that conflict and made findings that the primary duty of Plaintiffs was not management and that Defendants had not carried their burden of proof on this issue.

Unless Defendants carried their burden of proof on the "primary duty" issue, they cannot prevail on the executive exemption issue. The trial court found, as a fact, that:

1) The primary duty of Plaintiffs was *not* management,

   and

2) Defendants had failed to sustain their burden of proof that the primary duty was management.

III

The statement of the panel "that Respondents were entitled to have one designated exempt executive at each . . . facility" is legally erroneous and cannot be used as support for substituting the judgment of the three judge panel for that of the trial court.

At page 9 of their Brief Respondents contend that the three judge panel " . . . held as a matter of law, that

Respondents were entitled to have one designated exempt executive at each of their remotely located facilities."

The opinion of the panel does contain a statement similar to that (App. p. 10a). But that statement is clearly erroneous as a matter of law. That statement of the law by Respondents and by the Court flies in the face of 29 C.F.R. § 541.1 which requires among other things that the primary duty of the employee be management, that the employee be paid certain amounts and that the employee regularly supervise two or more employees. On that basis it is clear that *no one* at a given facility might qualify, for example:

1) If none was paid over $150.00 per week, or
2) If there were only one or two employees at a given location.

The three judge panel of the Eighth Circuit has clearly substituted its judgment of the facts on the "primary duty" issue for that of the trial court.

IV

Respondents' Brief misconceives the action of the three judge panel.

Respondents contend at page 3 of their Brief that " . . . the Eighth Circuit panel did not make factual findings on their own nor did they substitute their judgment of the facts for that of the District Court. . . . "

Similar assertions are made elsewhere in their Brief. These assertions are apparently made because Respondents do not recognize that what the Eighth Circuit Panel really did was to reverse, or alternatively to ignore, the findings of fact of the trial court under the guise of interpreting the regulations. As demonstrated above, a

finding of executive exemption cannot stand in the face of the four findings of fact set forth at pages 6 and 7 of the Petition and again at page 2 of this Reply.

The Eighth Circuit panel ignored those findings of fact. Respondents also choose to ignore those findings of fact. But those findings preclude any ultimate finding of executive exemption.

V

Respondents' Brief misconceives, mischaracterizes, ignores, or misconstrues the Petition for Writ of Certiorari.

A. Respondents admit in their Brief (p. 3) " . . . that exemptions are to be narrowly construed and the employer is held to a strict burden of proof." Yet at page 5 of their Brief they contend that the " . . . EXEMPT OR NON-EXEMPT STATUS UNDER THE FLSA IS A QUESTION OF LAW". Of course, that status includes the fact question of "primary duty" on which Respondents admit they have a strict burden of proof. Obviously the trial court found against Respondents on that fact issue holding they did not meet their strict burden of proof. That obviously is not a question of law.

Respondents also ignore all of the recent decisions of the Fifth Circuit, the Third Circuit, and the Eleventh Circuit, cited and discussed at pages 11-14 of the Petition. Particularly noteworthy is the omission of any discussion of *Dalheim v. KDFW-TV*, 918 F.2d 1220 (5th Cir. 1990). In that case the court held, as noted at page 12 of the Petition, that the question of "primary" duty is based on inferences, which are reviewed for clear error. Only by ignoring *Dalheim, supra*, as Respondents have done, can they assert that is a question of law.

B. Respondents, in their Brief (p. 13) state that " . . . Petitioners' suggestion that equal treatment in the appellate process should not be afforded them (Respondents) just because of their employer status is entirely unfounded." But that simply is not what Petitioners said in their Petition for Writ of Certiorari. What Petitioners said was " . . . that the *same* standard of review should be applied by the Circuit Court when the worker wins in the trial court as when the employer wins in the trial court." (p. 8 of the Petition) (emphasis supplied)

C. At page 14 of their Brief, Respondents grab onto the statement of the Circuit Court (taken out of context) that:

> "the sole charge exception seems to be written for employees like these store managers . . . It is clear that Stuckey's store managers satisfy these sole charge standards." (Appendix, p. 15a).

Had Respondents' counsel read *Donovan v. Waffle House, Inc.*, 26 Wage and Hour Cases (BNA) 868 (N.D. Ga. 1983), cited by Respondents in their Circuit Court Brief and cited by the Circuit Court in its opinion, Counsel would have known that statement is indefensible and incorrect.

In *Waffle House, supra,* the court discussed the regulations (29 C.F.R. § 541.113) dealing with the sole charge exception and stated:

> " . . . the court takes judicial notice of the fact that this interpretation was first issued in 1949 when not only was the franchise restaurant industry not covered by the Act, but retail trade as a class was not covered."

Retail employees were not covered by the Act until 1961. A regulation written in 1949 could hardly have been

"written for employees like these store managers" who were not even covered by the Act until 1961.

D. At page 16 of their Brief Respondents state "Petitioners' argument amounts to nothing more than saying that an award to employees should never be reversed." Again, this statement misconceives the Petition for Writ of Certiorari. What Petitioners have said is that findings of fact by the trial court as to primary duty and the executive exemption should not be set aside or ignored. This is particularly true where the complaining party has the burden of proof. Nowhere in Respondents' Brief have they come to grips with the four findings of fact set forth at pages 6 and 7 of the Petition. Instead Respondents choose to ignore those findings of fact, as did the three judge panel.

E. At page 1 of their Brief Respondents state "The managers filed suit claiming they worked twenty-four (24) hours a day throughout their periods of employment." No such claim was made in the Complaint. The Complaint simply alleged that Gladys Murray was employed " . . . for work weeks longer than forty (40) hours per week" without paying overtime.

After discovery had begun, it became apparent that Plaintiffs might be entitled to pay for "on call" time and in compliance with their ethical obligations, Plaintiffs' counsel at trial did seek overtime pay for "on call" time. The trial court made findings of fact adverse to Plaintiffs on the issue of "on call" time. (Finding of Fact 39) (App. p. 41a) Plaintiffs accepted and did not contest those adverse findings of fact. Respondents should likewise accept and not contest the findings of fact adverse to them.

F. Respondents in their Brief (p. 16) chide Petitioners' counsel because " . . . they did not bother to read the First Circuit's *Burger King*[1] decision . . . " and for " . . . lack of diligence . . . " Perhaps some apology on this is in order, and Petitioners apologize to the Court for overlooking the First Circuit's *Burger King* case.

However, Petitioners counsel do contend they used reasonable diligence. Counsel conducted a Westlaw computer search of Wage and Hour cases in which reversal was mentioned in connection with the entitlement to the executive exemption. Fifty-four (54) cases were disclosed by Westlaw. *Burger King* was not among them. Each of those 54 cases was carefully checked by counsel for Petitioners prior to completion of their Petition.

Aside from that, the First Circuit's decision in *Burger King* affirmed the judgment of the trial court, except as to assistant managers who earned at least $250.00 per week.[2] As to those who earned at least $250.00 per week the First Circuit set aside the trial court's finding of fact because it was inconsistent with other findings of fact of the trial court. Except for the modification made herein, Petitioners stand on the statements made in the Petition.

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[1] *Donovan v. Burger King Corporation*, 672 F.2d 221 (1st Cir. 1982)

[2] Nearly all of the so-called "managers" who are Petitioners herein earned less than $250 per week. *Burger King* is also quite different on other facts. Perhaps the most notable is that the assistant managers supervised up to 25 other employees at any one time.

CONCLUSION

For the reasons stated in our Petition and in this Reply Brief, we respectfully submit, our Petition for a Writ of Certiorari should be granted.

DATED January 14, 1992.

Respectfully submitted,

P. L. NYMANN
Counsel of Record for Petitioners
383-390 Orpheum Electric Bldg.
P.O. Box 1825
Sioux City, Iowa 51102
Phone: (712) 258-0101

STEVEN C. KOHL
Co-Counsel for Petitioners
383-390 Orpheum Electric Bldg.
P.O. Box 1825
Sioux City, Iowa 51102
Phone: (712) 258-0101

P. L. NYMANN
and
STEVEN C. KOHL
On the Reply Brief